Supreme Court, U.S.
FILED

No. 98- 981449 MAR 12 1999

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*,
Petitioners,

v.

DENICE H. REIN, *et al.*,
Respondents,

and

UNITED STATES OF AMERICA,
Intervenor.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT C. MIRONE
Counsel of Record for Petitioners
LAW OFFICES OF
ROBERT C. MIRONE, P.C.
630 Third Avenue, 21st Floor
New York, New York 10017
(212) 949-0550

BRUNO A. RISTAU
LAW OFFICES OF BRUNO A. RISTAU
1701 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20006
(202) 879-2655

DAVID B. MELTZ
1422 W. Peachtree St., N.W.
Suite 320
Atlanta, Georgia 30309
(404) 724-0712

Of Counsel
JEAN-LUC MARX
72, Boulv. De Courcelles
F-75017 Paris, France

82pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in sustaining the constitutionality of an amendment to the Foreign Sovereign Immunities Act that confers subject-matter jurisdiction in damage suits by U.S. nationals for exterritorial torts committed by states that have been designated by the Executive as "state sponsors of terrorism."

2. Whether the court of appeals erred in declining to review, for lack of appellate jurisdiction, the district court's ruling that it had personal jurisdiction over the petitioners.

3. Whether the court of appeals erred in declining to review prior to trial the district court's ruling that in this proceeding it had pendent jurisdiction to hear claims by aliens against Libya under the Alien Tort Act.

Rule 14(1)(b) Statement

The petitioners are: the Socialist People's Libyan Arab Jamahiriya, an independent sovereign state that is recognized by the Government of the United States; the Libyan External Security Organization, a department of the Libyan Government; Libyan Arab Airlines, a Libyan corporation, a majority of whose stock is owned by the Libyan Government.

The names of the 128 respondents are listed in the caption of the court of appeals' decision (App. 1a - 8a).

Rule 29(4)(b) Statement

The United States intervened as a party in the court of appeals pursuant to 28 U.S.C. §§517 and 2403 to defend the constitutionality of the 1996 Amendment to the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(7).

Copies of this petition have been served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 6

A. Introduction 6

B. The Factual Allegations 7

C. The Proceedings Below 10

REASONS FOR GRANTING THE WRIT 13

I. Congress' Unprecedented Delegation To Executive Officials Of The Control Over Federal Court Jurisdiction In Suits Against Foreign States Should Be Reviewed By This Court 13

II. The Court of Appeals Erred In Holding That The Collateral Order Doctrine Bars Interlocutory Review Of The Issue Of Personal Jurisdiction 18

III. The Court of Appeals Erred In Dismissing for Want of Appellate Jurisdiction Libya's Challenge To The Alien Plaintiffs' Claims For Relief Under the Alien Tort Act 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES:

Alejandre v. Republic of Cuba, 996 F.Supp. 1239 (S.D. Fl. 1997) 16

Anderson v. Socialist Peoples' Libyan Arab Jamahiriya, Case No. 98CV7533 (TCP) (E.D.N.Y). 22

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 22, 23

Cicippio v. Islamic Republic of Iran, 18 F.Supp. 2d 62 (D.D.C. 1998) 16

Compania Mexicana de Aviacion, S.A. v. United States Dist. Court for the Cent.Dist. Of Cal., 859 F.2d 1354(9th Cir. 1988) 20

Cummock v. Libya, Case No. 96-CV-2993 (E.D.N.Y.) . 9

Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d, 1270(3d Cir. 1993), *cert. denied*, 511 U.S. 1107 (1994) 20

Flatow v. Islamic Republic of Iran, 999 F.Supp. 1 (D.D.C. 1998) 16

Gould, Inc., v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988) 20

In re Air Disaster in Lockerbie, Scot. 733 F.Supp. 547 (1990), *aff'd*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) 6

Table of Authorities (continued)

Page(s)

In re Air Disaster at Lockerbie, Scot., 37 F.3d 803 (2d Cir. 1994), *cert. denied sub nom. Pan American World Airways, Inc. v. Pagnucco*, 513 U.S.1126 (1995) 6

Jungquist v. Sheikh Sultan Bin Khalifa Al Nayhan, 115 F.3d 1020 (1997) 20

Pescatore v. Pan American World Airways, Inc., 97 F.3d 1 (2d Cir. 1996) 6

Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994), *cert.denied*, 115 S.Ct. 923 (1995) 20

Rendall-Speranza v. Nassim, 107 F.3d 913 (D.C. Cir. 1977) 20

Rein v. Socialist People's Libyan Arab Jamahiriya, No. 96-CV-3803 (E.D.N.Y.) 7

Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F.Supp. 325 (E.D.N.Y.), *aff'd in part and dismissed in part*, 162 F.3d 748 1

Rush-Presbyterian-St. Luke's Ctr. v. Hellenic Republic, 877 F.2d 574 (7th Cir. 1989) 20

Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1569 (1997) 6

Stena Rederi AB v. Comision de Contratos del Comite, 923 F.2d 380 (5th Cir. 1991) 20

Table of Authorities (continued)

Page(s)

Swint v. Chambers County Comm'n, 514 U.S. 35 (1995) 13, 18, 19

Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 15

CONSTITUTIONAL PROVISIONS AND STATUTES:

Article III of the Constitution of the U.S. 11

Bill of Attainder Clause 10

Ex Post Facto Clause 10

Fifth Amendment's Due Process Clause 10

Alien Tort Act, 28 U.S.C. §1350 . . . . . 1, 10, 22, 23

Antiterrorism Act, 18 U.S.C. §2334(b) 10

Export Administration Act of 1979, Sec. 6(j) 7

Foreign Sovereign Immunities Act:

28 U.S.C. §1330(a) 1, 9

28 U.S.C. §1330(b) 19

28 U.S.C. 1605(a)(7) . . . . . *passim*

Torture Victim Protection Act 10

28 U.S.C. 1254(1) 1

28 U.S.C. §1331 . . . . . 1, 10

28 U.S.C. §1332 . . . . . 1, 10

Table of Authorities (continued)

Page(s)

MISCELLANEOUS:

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, September 23, 2971, 24 U.S.T. 564, T.I.A.S. No. 7570. 4

15 C.F.R. §750.4(b)(6)(i) 7

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) . . 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*,
Petitioners,

v.

DENICE H. REIN, *et al.*,

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a - 36a) is reported at 162 F.3d 748 (1998). The opinion of the United States District Court for the Eastern District of New York (App. 37a - 50a) is reported at 995 F.Supp. 325 (1998).

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1998. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The jurisdiction of the district court was invoked under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1605(a)(7); under federal question jurisdiction, 28 U.S.C. §1331; diversity jurisdiction, 28 U.S.C. §1332; and under the Alien Tort Act, 28 U.S.C. §1350.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States of America provides in pertinent part:

> No person shall be . . . deprived of . . . liberty, or property, without due process of law;

2. The 1996 Amendment to the Foreign Sovereign Immunities Act of 1976 (Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, Title II, §221(a), Apr. 24, 1996, 110 Stat. at 1241), codified in 28 U.S.C. §1605(a)(7), reads in relevant part as follows:

> [§1605. *General exception to the jurisdictional immunity of a foreign state*
>
> (a) a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –]
>
> (7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –
>
> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of

the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

* * * *

(e) For purposes of paragraph (7) of subsection (a)–

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[1]

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

---

[1] Article 1 of the Convention reads as follows:

1. Any person commits an offense if he unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (done at Montreal, September 23, 2971), 24 U.S.T. 564, T.I.A.S. No. 7570.

3. Sec. 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. §2405(j), reads in pertinent part as follows:

(j) Countries supporting international terrorism

(1) A validated license shall be required for the export of goods or technology to a country if the Secretary of State has made the following determinations:

(A) The government of such country has repeatedly provided support for acts of international terrorism.

(B) The export of such goods or technology could make a significant contribution to the military potential of such country, including its military logistics capability, or could enhance the ability of such country to support acts of international terrorism.

(2) The Secretary and the Secretary of State shall notify the Committee on Foreign Affairs of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs and the Committee on Foreign Relations of the Senate at least 30 days before issuing any validated license required by paragraph (1).

(3) Each determination of the Secretary of State under paragraph (1)(A), including each determination in effect on December 12, 1989, shall be published in the Federal Register.

STATEMENT OF THE CASE

A. Introduction

This case arises out of the destruction of an American airliner ("Pan Am flight 103") over Lockerbie, Scotland, on December 21, 1988. The destruction caused the death of all 243 passengers and 16 crew members, as well as 11 persons on the ground. In 1989, survivors and representatives of the decedents brought wrongful death actions against the air carrier, Pan American World Airways, Inc., in several district courts. These suits were consolidated in the Eastern District of New York and have occupied the district court and the Second Circuit for the past decade.[2]

In 1994, numerous survivors and representatives of the victims of the Lockerbie disaster instituted suit in several districts under the Foreign Sovereign Immunities Act ("FSIA") against the Libyan government, Libya's intelligence service, Libya's national commercial airline (collectively "Libya"), and two Libyan nationals.[3] The Second Circuit affirmed the district court's dismissals of these suits for lack of jurisdiction under the FSIA. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1569 (1997).

In 1996, during the pendency of the *Smith* appeal, Congress enacted the amendment to the FSIA in issue here

---

[2] *See, In re Air Disaster in Lockerbie, Scot.* 733 F.Supp. 547 (1990), *aff'd*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991); *In re Air Disaster at Lockerbie, Scot.*, 37 F.3d 803 (2d Cir. 1994), *cert. denied, sub nom. Pan American World Airways, Inc. v. Pagnucco*, 513 U.S. 1126 (1995); *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1 (2d Cir. 1996).

[3] The two individuals have not been served and have not entered appearances. (App. 40a n.1, 995 F.Supp at 328 n.1).

("FSIA Amendment" or "§1605(a)(7)," reproduced, *supra* at pp. 2-4). The amendment permits suits by U.S. nationals against selected foreign states for damages for personal injury or death caused by an act of torture, summary execution, aircraft sabotage, hostage taking or provision of support or resources for such an act committed outside of the United States. Such suits may be brought only against foreign sovereigns designated by the Secretary of State as "state sponsors of terrorism." Libya is said to have been designated by the Secretary of State under Section 6(j) of the Export Administration Act of 1979 as a "terrorist-supporting" state[4].

Following the enactment of the amendment, the *Smith* plaintiffs and scores of other claimants filed new multi-plaintiff suits against Libya under the FSIA Amendment in several districts, and these suits were once again consolidated in the Eastern District of New York. We summarize below the allegations in the two lead cases.

B. The Factual Allegations

The amended complaint in *Rein v. Socialist People's Libyan Arab Jamahiriya*, No. 96-CV-3803, E.D.N.Y., (J.A.

---

[4] In the court below, the United States identified the statutory mandated designation by the Secretary of State as 15 C.F.R. §750.4(b)(6)(i) and stated that Libya was designated as a terrorist state "before the attack on Pan Am Flight 103." Brief for the United States as Intervenor, 2d Cir., No. 98-7467 at 5. The cited C.F.R. section, however, lists only the seven countries said to have been designated as of January 1998; it does not identify when and by whom the designation was made, nor does it give a Federal Register citation as required by Sec. 6(j)(3) of the Export Administration Act, 50 U.S.C. App.

Our search of the Federal Register since the enactment of the Export Administration Act of 1979 has failed to disclose an express determination by the Secretary of State pursuant to Sec. 6(j) of the Act.

at A24-A43[5]) lists in its caption ninety-nine plaintiffs, identified as survivors, executors, administrators or personal representatives of the estates of persons killed while passengers aboard PanAm 103. Libya and its agencies are once again named as defendants. The majority of the plaintiffs and their decedents are United States nationals; an as yet unidentified number of plaintiffs and their decedents are aliens.

The *Rein* complaint alleges that in the early evening of December 21, 1988, Claimants' decedents were passengers on board PanAm Flight 103 ("PanAm 103") on a regularly scheduled flight from London to New York. Shortly after 7:00 p.m., an explosion occurred in the forward baggage compartment of the aircraft causing it to disintegrate in mid-air and to crash to the ground at Lockerbie, Scotland, killing all 243 passengers, 189 of whom were United States nationals, and 16 crew members.

The complaint asserts that the victims' deaths were caused by Libya's willful and deliberate acts of extrajudicial killing and aircraft sabotage and that the explosive device that caused the destruction of the aircraft was purposely placed on board PanAm 103 by individuals in the service, or acting on behalf, of Libya. Since Libya's agents and officials provided material, support and resources to the individuals responsible for the destruction of the plane, Libya is vicariously responsible for its co-defendants' acts because Libya controlled and acted in concert with them.

---

[5] "J.A." refers to the Joint Appendix filed by the parties in the Second Circuit, copies of which have been lodged with the Clerk of this Court.

The complaint further alleges that Libya's intelligence service is an independent agency of Libya[6] whose agents and employees were among those directly responsible for the destruction of PanAm 103. The service cooperated with the perpetrators of the crime by supplying them money, labor, intelligence information, equipment and supplies.

Libyan Arab Airlines, too, is claimed to have provided material support and resources to the persons responsible for the destruction of Pan Am 103. The airline's employees and agents provided transportation and materials to the perpetrators, furnished storage facilities, baggage documents, access to airport facilities and baggage handling systems, knowing that such acts would assist the perpetrators in carrying out the destruction of Pan Am 103.

The *Rein* complaint asserts three claims for relief: damages for wrongful death for each claimant and each decedent's estate in the amount of $20-million; survival damages of $1-million for the conscious pain and suffering and fear of impending death suffered by each of the decedents prior to their deaths; and punitive damages of $2-billion against the security organization and the Libyan airline.

The complaint in the second lead action, *Cummock v. Libya*, Case No. 96-CV-2993 (E.D.N.Y.), alleges the same core facts regarding the destruction of Pan Am 103 (*Cummock* 1st amd. compl. J.A. at A67-A91). The jurisdictional allegations and the relief sought in the *Cummock* complaint differ considerably from those in the *Rein* complaint. Thus, the *Cummock* plaintiffs invoke the district court's jurisdiction under the FSIA Amendment, 28 U.S.C. §1330(a), 1605(a)(7),

---

[6] Libya informed the district court that the Libyan intelligence service is an organ of the Government of Libya and not a separate legal entity suable in its own name.

under federal question 28 U.S.C. §1331, diversity 28 U.S.C. §1332, Alien Tort Act jurisdiction, 28 U.S.C. §1350, and under the civil remedies provision of the Antiterrorism Act, 18 U.S.C. §2334(b).

Each of the *Cummock* claimants seeks damages against the petitioners jointly and severally in the amount of $20-million for wrongful death under the Antiterrorism Act and the Torture Victim Protection Act; for battery in violation of international laws and treaties; for intentional infliction of emotional distress on the victims and on the survivors of the plane crash; for violation of international law and treaties; $5-million each for loss of consortium on behalf of the surviving spouses; punitive damages of $1-billion against the Libyan External Security Organization and Libyan Arab Airlines; and enforcement of a guaranty said to have been given by Libya to the United Nations to pay any civil judgments that may be entered against the two individual defendants in the future.[7]

C. The Proceedings Below

In July 1997, Libya moved in the district court to dismiss the suits. Libya's motion challenged at the outset the constitutionality of the FSIA Amendment on the ground that the assertion of subject-matter jurisdiction against it violated the principle of separation of powers as well as the Due Process, Bill of Attainder and Ex Post Facto Clauses. Libya also challenged the district court's personal jurisdiction over it due to lack of the constitutionally mandated minimum contacts. Finally, Libya challenged the district court's subject-matter jurisdiction to hear the alien plaintiffs' claims

---

[7] The *Cummock* complaint also alleges that the suit is brought on behalf of a class estimated in excess of five hundred members. The district court declined certification of the class.

under the Alien Tort Act because the 1996 Amendment expressly bars suit by aliens, and also because this Court had expressly ruled that the Act does not permit suit against foreign states.

The United States filed a Statement of Interest supporting the constitutionality of §1605(a)(7) and the propriety of the assertion of personal jurisdiction over Libya.[8]

The district court denied Libya's motion in its entirety. It held that Section 1605(a)(7)'s denial of immunity to states designated by the Secretary of State as "state sponsors of terrorism" was constitutional because the Amendment itself and the Secretary's designations were not jurisdictional. In the court's view, subject-matter jurisdiction was based directly on Art. III of the Constitution, and the Secretary's determination merely revived the State Department's traditional practice of advising the courts that a defendant state's claim to sovereign immunity had been denied in a given case. (App. 41a, 995 F.Supp. at 328). The court further held that the FSIA Amendment conferred upon the court discretionary authority to hear cases against states designated as sponsors of terrorism, and that in the instant case he would exercise that discretion. (App. 42a, 995 F.Supp. at 328).

The district court next ruled that under the circumstances of these cases the assertion of personal jurisdiction over Libya was proper and that under the traditional minimum contacts analysis the relevant inquiry was whether Libya had "fair warning" that it may be subject to the jurisdiction of the courts of the United States. (App. 45a, 995 F.Supp. 330). Here, the

---

[8] The United States did not comment on whether the alien plaintiffs could assert claims against Libya under the Alien Tort Act on the theory of pendent personal jurisdiction.

plaintiffs claim that Libya aimed its terrorist acts at the United States. The claims arise out of the destruction of an airplane manufactured and registered in the United States, while en route to the United States, with 189 U.S. nationals aboard. Under these circumstances, Libya should have reasonably anticipated that it would be haled into an American court to respond in damages for its tortious acts. (App. 45a, 995 F.Supp. at 330).

The district court next rejected Libya's claim that the FSIA Amendment offended the Ex Post Facto Clause. (App. 48a, 995 F.Supp at 331). In the court's view, that Clause protects only individuals from arbitrary penal sanctions that work unfairly to deprive them of a liberty interest, and is inapplicable to a foreign state's immunity from suit. Moreover, no restrictive penal sanctions are imposed on a foreign state when the United States denies to it sovereign immunity from suit. A retroactive imposition of punitive damages, as permitted by the FSIA, was not before the court. (App. 48a, 995 F.Supp. at 331).

The district court finally concluded that because it had subject-matter and personal jurisdiction over Libya, under the FSIA Amendment, it had pendent jurisdiction over all remaining claims. Among the "remaining claims" are the alien plaintiffs' claims against Libya under the Alien Tort Act for violation of international law. (App. 49a, 995 F.Supp. at 331).

Libya filed a timely appeal, challenging the district court's rulings on subject-matter and personal jurisdiction under the FSIA Amendment, and its subject-matter jurisdiction regarding the alien claimants' Alien Tort Act claims.

The Second Circuit affirmed the district court's ruling upholding the constitutionality of the FSIA Amendment and its competence to hear these suits, although it disapproved the lower court's analysis of the Amendment. (App. 31a-33a, 162 F.3d at 762-63). The appeals court dismissed for lack of appellate jurisdiction all other aspects of Libya's appeal on the authority of *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). (App. 21a-22a, 162 F.3d at 758). In the court's view, Libya's challenge of the district court's personal jurisdiction over it raised an issue that was not closely intertwined with the district court's subject-matter jurisdiction and will have to await review until after a trial on the merits. (App. 22a-27a, 162 F.3d at 759-61). Similarly, Libya's liability under the Alien Tort Act and punitive damages raised issues that were not within the "collateral order" exception to the final order rule. (App. 27a-30a, 162 F.3d at 761-62).

REASONS FOR GRANTING THE WRIT

I. Congress' Unprecedented Delegation To Executive Officials Of The Power To Create Federal Court Jurisdiction In Suits Against Foreign States Should Be Reviewed By This Court

The 1996 Amendment seeks to confer subject-matter jurisdiction on federal courts to hear claims against selected foreign states and their agencies for specified international delinquencies committed against nationals of the United States abroad. The Executive Branch is to designate as "state sponsors of terrorism" those states that are denied immunity from suit for causing tortious injury or death. The Amendment is retroactive and requires that suit be brought within ten years after the date on which the claim arose. Any period during which the foreign state was immune from suit tolls the running of the limitation period. Libya is one of seven states so designated.

It is patent that the Executive's political decision branding a foreign state a sponsor of terrorism forms the core of the district courts' subject-matter jurisdiction under the 1996 Amendment.

Libya challenged the FSIA Amendment on the grounds that it violated the doctrine of separation of powers and the principle of non-delegation of legislative powers. No one questions the prerogative of the political branches to label a foreign state with a pejorative in world fora. No one disputes the political branch's authority to impose trade or other sanctions on selected states either unilaterally or in concert with other states. The Amendment, however, goes farther. It politicizes the judiciary in the interest of foreign policy and assigns to the Executive the power selectively to determine the subject-matter jurisdiction of federal courts. Such action is unprecedented; never since the enactment of the First Judiciary Act has Congress attempted to establish the competence of lower federal courts based on purely political and unchallengeable decisions of the Executive Branch.

The district court rejected Libya's challenge ruling Libya's argument was based on a "false premise." In the district court's view, subject matter jurisdiction of federal courts is not bestowed by Congress or the Executive but directly by Article III of the Constitution. (App. 41a, 995 F.Supp. at 328). The district court inexplicably reasoned that in passing the FSIA Amendment Congress conferred discretion on the district courts as to when they should hear cases against foreign states designated as "terrorist." In the court's view, the Amendment "leaves open, *i.e.*, in the discretion of the Court, the power to hear claims against those nations so designated." (App.42a, 995 F.Supp. at 328).

The court of appeals rejected this view of the effect of the Amendment on the jurisdiction of federal courts. (App. 32a

n.12, 162 F.3d at 763 n.12). The court correctly noted that *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), established firmly that sovereign immunity under the FSIA is a jurisdictional issue, not an affirmative defense and that, therefore, the unconstitutional delegation problem cannot be avoided by the unrealistic reasoning of the district court. (*Ibid.*). The court readily acknowledged that "the power to determine the applicability of the FSIA can indeed be the power to set the jurisdiction of the federal courts." (App. 33a, 162 F.3d at 763 n.14). It concluded, however, that in this case the delegation issue did not arise because at the time §1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism for purposes of trade sanctions under the Export Administration Act. Hence, "no decision by the Secretary was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103." (App. 35a-36a, 162 F.3d at 764). In the court's view, the issue of delegation could only be presented by a foreign state that was not on the list of state sponsors of terrorism when §1605(a)(7) was enacted. The court, therefore, rejected Libya's facial challenge to the Amendment.

But the vice of allowing a purely political determination by the political branches of the government to establish the competence of federal courts is the same regardless of when a sovereign state is listed as a "state sponsor of terrorism." It is obvious that the designation delegates a core legislative function - the control of federal court jurisdiction – to the Executive. Congress itself plays no role in making the determination that a given foreign state deserves to be characterized a sponsor of terrorism. Congress has given to the Executive unfettered discretion to decide whether and when to list a foreign state as a sponsor of terrorism. As regards the Judicial Branch, the FSIA Amendment instructs lower federal courts that the designation of a foreign

sovereign as a state sponsor of terrorism renders them competent to sit as an *ad hoc* international court, unilaterally established by the United States, to hear and adjudicate certain international delicts claimed to have been committed by such states against U.S. nationals anywhere in the world. Unlike traditional international tribunals, federal courts are authorized to punish such states by awarding unlimited punitive damages. That this view is not fanciful is illustrated by the experience to date with suits brought under §1605(a)(7) against Iran and Cuba.[9] Such suits are destructive of the U.S. Government's efforts to ease the strained relations between the United States and those states.

The 1996 Amendment has politicized the federal judiciary to an extent unprecedented in the history of the Judicial Branch since the founding of this Republic. The grant of subject-matter jurisdiction to federal courts in Section §1605(a)(7) of the 1996 FSIA Amendment exceeds Congress'

---

[9] *See Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1998) (suit against Iran for alleged support of terrorist groups in West Bank; estate and family members of American student killed in suicide bomber attack by Palestinian terrorist in the Gaza Strip awarded $2.5-mil. compensatory damages; $22.5-mil. solatium; and $225-mil. – comprising three times Iran's estimated annual expenditure for terrorist activities – in punitive damages);

Alejandre v. Republic of Cuba, 996 F.Supp. 1239 (S.D. Fl. 1997) (administrators of three U.S. nationals killed when their private planes were shot down by Cuban Air Force awarded $49.9-mil. in compensatory damages and $137.7-mil. - comprising 3% of the estimated value of Cuban Air Force's MIG fighter fleet - in punitive damages);

Cicippio v. Islamic Republic of Iran, 18 F.Supp. 2d 62 (D.D.C. 1998) (three former hostages in Lebanon brought suit against Iran, alleging that their captors had received financial support from Iran; court awarded compensatory damages to the hostages of $9, $16 and $20-mil., respectively, and to each of their wives $10-mil. for loss of society and companionship).

constitutional authority. Finally, Libya contended both in the district court and in the court of appeals that the Amendment violated the equal protection component of the Fifth Amendment's Due Process Clause. It argued that by use of the term "state sponsor of terrorism", the Congressional scheme impermissibly subjects Libya to liability for punitive damages while insulating non-designated states from such damages. Libya further urged that use of the term "state sponsor of terrorism", as a non-reviewable jurisdictional predicate for suits under §1605(a)(7), violated the evidentiary rule against the impermissible use of character evidence, thus depriving Libya of a fair trial on the merits. The right to a fair trial is a fundamental right under the Fifth Amendment. Thus, to pass constitutional muster, the distinction between "state sponsor[s] of terrorism" and all other states must be shown to further a compelling governmental purpose. The district court, using the rational basis test, rejected this challenge.

The court of appeals did not address the issue due to its dismissal of that part of Libya's appeal for lack of appellate jurisdiction.

In sum, the Amendment violates the principle of separation of powers and deprives Libya of its rights to a fair trial by delegating to the Executive the power to establish the subject matter jurisdiction of federal courts based on transitory political considerations. Whether the 1996 Amendment's conferral of subject matter jurisdiction goes beyond the bounds established by the Constitution should be reviewed by the Court.

II. The Court of Appeals Erred In Holding That The Collateral Order Doctrine Bars Interlocutory Review Of Personal Jurisdiction In An FSIA Suit

The court of appeals was of the view that in suits against foreign states under the FSIA subject-matter and personal jurisdiction present separate issues. (App. 22a-23a, 162 F.3d at 759). The court accurately stated that "Libya's challenge to personal jurisdiction is based on due process and the principle of minimum contacts." (*Ibid.*) It then proceeded to disregard the unique interrelationship in the FSIA between the concepts of "subject-matter" and "personal" jurisdiction, and it misread the holding in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995).

Swint, was a civil rights action against three police officers, a municipality and a county commission. The police officers took a collateral appeal to the Eleventh Circuit from the denial of their plea of qualified immunity, in which the county commission joined, seeking review of the district court's denial of its summary judgment motion on liability. The Eleventh Circuit heard both appeals, and this Court reversed.

The Court held that "the Eleventh Circuit's unquestioned authority immediately to review the district court's denial of the police officers' claim of qualified immunity did not include authority to review at once the unrelated question of the County Commission's liability." (514 U.S. at 51). The district court's ruling on the County's potential liability did not qualify as a "collateral order." The Court held that "there is no '*pendent party*' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise." (*Ibid.*, emphasis added).

Swint plainly teaches that a party that itself cannot maintain an interlocutory appeal under the collateral order doctrine may not, under the guise of pendent party appellate jurisdiction, obtain review of an issue unrelated to the issue involved in the collateral appeal. Moreover, the district court's denial of the County Commission's summary judgment motion on liability was not jurisdictional, but was wholly separate and distinct from the court's ruling on the policemen's qualified immunity motions. It is manifest that the issues which the County Commission raised were wholly unrelated to the police officers collateral appeal. Here, the issues of subject-matter and personal jurisdiction are inseparable. Thus, the court of appeals' reliance on *Swint* was wholly misplaced.

The legislative history of the FSIA makes it clear that the issue of subject-matter jurisdiction and personal jurisdiction are inextricably intertwined.[10] Although this Court has not

---

[10] Section 1330(b)of the FSIA reads as follows:

> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

The legislative history of the Act explains this provision thus:

> (b) *Personal Jurisdiction*. Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, (1957). For personal

specifically addressed this issue in any of its FSIA decisions to date, all circuits that had occasion to deal with the issue have uniformly held that both subject-matter and personal jurisdiction are inextricably intertwined; both present pure questions of law and are properly reviewed prior to a potentially protracted trial on the merits.[11]

The court of appeals' ruling here is also in conflict with the D.C. Circuit's rulings in *Jungquist v. Sheikh Sultan Bin Khalifa Al Nayhan*, 115 F.3d 1020 (1997) and *Rendall-Speranza v. Nassim*, 107 F.3d 913 (1977). In *Jungquist*, a collateral order appeal was taken from a district court order denying a motion to dismiss a suit under the FSIA against members of the royal house of Abu Dhabi for lack of subject-matter and personal jurisdiction. The D.C. Circuit affirmed the district court's ruling on subject-matter jurisdiction but reversed its ruling on personal jurisdiction and ordered the

---

> jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States . . .

H.R. Rep. 94-1487, 94th Cong., 2d Sess. at 13 (1976).

[11] *See Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d, 1270, 1282 (3d Cir. 1993), *cert. denied*, 511 U.S. 1107 (1994); *Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385 (5th Cir. 1991); *Gould, Inc., v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450-51 (6th Cir. 1988); *Rush-Presbyterian-St. Luke's Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court for the Cent. Dist. Of Cal.*, 859 F.2d 1354, 1358 (9th Cir. 1988); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert.denied*, 115 S.Ct. 923 (1995).

suit dismissed. Adopting the view of leading commentators, the court stated:

> Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development. Any other rule frequently would require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings.

115 F.3d at 1027.

Rendall-Speranza began as a suit by an employee of the International Finance Corporation against her supervisor in which the district court allowed the I.F.C. to be added as a defendant after the statute of limitations had run against it. Thereafter, the I.F.C. appealed the district court's denial of its motion to dismiss for lack of subject-matter jurisdiction under the International Organizations Immunities Act of 1945 and it also raised the limitation issue. The D.C. Circuit exercised pendent appellate jurisdiction over the limitations defense since, if validly raised, the entire action against the I.F.C. could be disposed of on limitations grounds. The court pretermitted the difficult and unresolved question of whether international organizations continued to enjoy absolute immunity from suit under the 1945 Act. Plainly, the limitations issue was wholly divorced from the immunity issue and was not independently appealable, yet it was addressed by the court of appeals in the interest of judicial economy.

The court of appeals' mistaken view of the FSIA's jurisdictional design and the conflict in circuits which its decision has created with respect to the reviewability of FSIA personal jurisdiction conjunctively with subject-matter jurisdiction fully merit review by this Court.

III. The Court of Appeals Erred In Dismissing for Want of Appellate Jurisdiction Libya's Challenge To The Alien Plaintiffs' Claims For Relief Under the Alien Tort Act.

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989) squarely teaches that "the FSIA is the sole basis for obtaining jurisdiction over a foreign state in our courts," to the exclusion of all other jurisdictional bases. The Court there unanimously held that suit will not lie against a foreign state under the Alien Tort Act, 28 U.S.C. §1350. That Act permits suit by aliens only against individuals, and all courts, with the exception of the district court here, have followed the Court's interpretation. In addition, in this case, Congress expressly excluded aliens from suits under the 1996 Amendment against states designated as "sponsors of terrorism". *See* §1605(a)(7)(B)(ii).[12] In this consolidated action, numerous plaintiffs or victims – as yet unidentified – are aliens.[13]

The district court denied that part of Libya's motion seeking dismissal of the alien claimant's suit for lack of

---

[12] "[T]he court shall decline to hear a claim under this paragraph [(a)(7)] . . . if . . . neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(2) of the Immigration and Nationality Act) when the act upon which the claim is based occurred."

[13] A multi-plaintiff suit was recently filed in the District Court for the District of Columbia against Libya and consolidated with the instant action in which all plaintiffs are aliens. Plaintiffs seek billions of dollars in compensatory and punitive damages. This filing is said to have been made on the authority of the district court's ruling in this case. *Anderson v. Socialist Peoples' Libyan Arab Jamahiriya*, Case No. 98CV7533 (TCP), (E.D.N.Y.)

subject-matter jurisdiction against Libya under the Alien Tort Act in a curt passage:

> Having established subject-matter and personal jurisdiction over ...[Libya] in this action, the Court also finds that it has pendent jurisdiction to hear all of the plaintiffs' remaining claims . . .

App. 49a, 995 F.Supp. at 331.

Libya's appeal challenged this ruling, but the court of appeals declined to hear the challenge when it dismissed "all other aspects of this interlocutory appeal for want of appellate jurisdiction." (App. 36a, 162 F.3d at 764).

Consequently, the district court's ruling that "pendent jurisdiction" *confers subject-matter jurisdiction against Libya* under the Alien Tort Act has been left standing. The ruling plainly conflicts with the *Amerada Hess* Court's express holding and merits review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. MIRONE
Counsel of Record for Petitioners
LAW OFFICES OF ROBERT C. MIRONE, P.C.
630 Third Avenue, 21st Floor
New York, New York 10017
(212) 949-0550

BRUNO A. RISTAU
LAW OFFICES OF BRUNO A. RISTAU
1701 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20006
(202) 879-2655

DAVID B. MELTZ
1422 W. Peachtree St., N.W.
Suite 320
Atlanta, Georgia 30309
(404) 724-0712

Of Counsel:
JEAN-LUC MARX
72, Boulv. De Courcelles
F-75017 Paris, France

Dated: March 12, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

Argued: November 13, 1998

Decided: Dec. 15, 1998

Docket No. 98-7467

DENICE H. REIN, individually and as Executrix of the Estate of Mark Alan Rein, deceased, BARBARA A. AHERN, individually and as Co-Administrator of the Estate of John M. Ahern, deceased, THOMAS A. AHERN, individually and as Co-Administrator of the Estate of John M. Ahern, deceased, MARION K. ALDERMAN, individually and as Administratrix of the Estate of Glenn John Bouckley, deceased, MARION K. ALDERMAN, individually and as Administratrix of the Estate of Paula Alderman Bouckley, deceased, CAROLYN AMMERMAN, individually and as Administratrix of the Estate of Thomas J. Ammerman, deceased, ARNOLD ASRELSKY, individually and as Co-Administrator of the Estate of Rachel Maria Asrelsky, deceased, HOPE ASRELSKY, individually and as Administrator of the Estate of Rachel Maria Asrelsky, deceased, WILLIAM GARRETSON ATKINSON, individually and as Administrator of the Estate of William Garretson Atkinson, III, deceased, DONA BARDELLI BAINBRIDGE, individually and as Administratrix of the Estate of Harry M. Bainbridge, deceased, KENNETH STUART BARCLAY, individually and as Personal Representative of the Estate of Stuart Murray Barclay, deceased,

RAQUEL LOPEZ BENVENUTO, individually and as personal Representative of the Estate of Fabrina Benvenuto Caffarone, deceased, PHILLIP B. BERGSTROM, individually and as Administrator of the Estate of Phillip V. Bergstrom, deceased, SANDRA BERNSTEIN CLARREN, individually and as Administratrix of the Estate of Judith Ellen Bernstein, deceased, STEPHANIE LASKIN BERNSTEIN, individually and as Administratrix of the Estate of Michael Stuart Bernstein, deceased, FRANCOISE BOYER BARDON, individually and as Administratrix of the Estate of Francis Boyer, deceased, ELEANOR HOEY BRIGHT, individually and as Administratrix of the Estate of Nicholas Bright, deceased, DIANA BROWNER, individually and as personal Representative of the Estate of Danielle Browner, deceased, PATRICIA A. BRUNNER, individually and as Administratrix of the Estate of Colleen R. Brunner, deceased, JULIANNE BUDWICK, individually and as Administratrix of the Estate of Eric John Williams, deceased, BRIAN D, BUTLER, individually and as Administratir Ad Prosequendum of the Estate of Steven Lee Butler, deceased, EDMUNDO LUIS CAFFARONE, individually and as personal representative of the Estate of Herman Luis Caffarone, deceased, GRACIELA CAFFARONE, individually and as personal representative of the Estate of Herman Luis Caffarone, deceased, SALVATORE V. CAPASSO, individually and as Co-Adminisatrator of the Estate of Gregory J. Capasso, deceased, BETTY-ANN CAPASSO, individually and as Co-Administrator of the Estate of Gregory J. Capasso, deceased, GENEVIEVE WALTERS, individually and as Administratrix of the Estate of Richard

Anthony Cawley, deceased, DANIEL EDWARD COHEN, individually and as Co-Administrator of the Estate of Theodora Eugenia Cohen, deceased, SUSAN HANDLER COHEN, individually and as Co-Adminstrator of the Estate of Theodora Eugenia Cohen, deceased, ALFRED CORNER, as Administrator of the Estate of Tracey Jane Corner, deceased, ELIZABETH DELUDE-DIX, individually and as Administratrix of the Estate of Peter T.S. Dix, deceased, PERRY DORSTEIN, individually and as Administrator of the Estate of David Scott Dornstein, deceased, JOHN M. FLYNN, individually and as Administrator of the Estate of John Patrick Flynn, deceased, EUPHEMIA MACALLISTER FOLEY, as Administratrix of the Estate of William K. MacKinnon MacAllister, deceased, LYNNE R. MOSES, individually and as Administratrix of the Estate of Daniel P. Rosenthal, deceased, LYNN KOENIG GARCZYNSKI, individually and as personal Representative of the Estate of Kenneth R. Garczynski, deceased, DOMINIQUE GARRETT, individually, ERNEST GARRETT, as Administrator of the Estate of Paul I. Garrett, Deceased, WENDY GIEBLER SIFCIK, individually and as Administratrix of the Estate of William D. Giebler, deceased, TERRI F. GOULD, individually and as Executrix of the Estate of David J. Gould, deceased, TATIANA GUEVORGUIAN, individually and as Administratrix of the Estate of Andre Guevorguian, deceased, ANTHONY B. HALL, individually and as Executor of the Estate of Nicola Jane Hall, deceased, PAUL HALSCH, individually and as Administrator of the Estate of Lorraine F. Halsch, deceased, HELEN ENGELHARDT HAWKINS, as Administratrix of

the Estate of Anthony Lacey Hawkins, deceased,
ANNE L. HUDSON, individually and as Administratrix of
the Estate of Sophia Hudson, deceased,
ROBERT R. HUNT, individually and as Administrator of
the Estate of Karen L. Hunt, deceased,
BEVERLY BRANIFF JECK, individually and as Executrix
of the Estate of Robert V, Jeck, deceased,
RAYMOND M. JERMYN, Sr., individually and as
Co-Administrator of the Estate of Kathleen M. Jermyn,
deceased, MARGARET M. JERMYN, individually and as
Co-Administrator of the Estate of Kathleen M. Jermyn,
deceased, GLENN P. JOHNSON, Jr., individually and as
administrator of the Estate of Beth Ann Johnson,
deceased, RITA F. KELLY, individually and as
Administratrix of the Estate of Julianne F. Kelly, deceased,
PATRICIA L. KINGHAM, individually and as Executrix
of the Estate of Jay J. Kingham, deceased,
MARINA M. KULUKUNDIS, as Administratrix
of the Estate of Minas Christopher Kulukundis, deceased,
BARBARA ANN LUDLOW, individually and as Special
Administratrix of the Estate of Lloyd David Ludlow,
deceased, PATRICIA AUDREY MARTIN, individually
and as Executrix of the Estate of Noel G, Martin, deceased,
MARJORIE G. MCKEE, individually and as Executrix
of the Estate of Charles Dennis McKee, deceased,
RHODA P. MILLER, individually and as Executrix of the
Estate of Joseph K. Miller, deceased,
GREGORY P. MORSON, individually and as
Co-Administrator of the Estate of Eva Ingeborg Morson,
deceased, VANESSA C. MORSON, individually and as
Co-Adminstrator of the Estate of Eva Ingeborg Morson,
deceased, SIOBHAN D. MULROY, individually and as
Executrix of the Estate of John Mulroy, deceased,
JUDITH A. PAGNUCCO, individually and as Executrix of

the Estate of Robert I. Pagnucco, deceased,
ERVIN PHILLIPS, individually and as Administrator of
the Estate of Sarah Phillips, deceased,
LISA PLATT, individually and as Administratrix of the
Estate of David Platt, deceased, MOLENA A. PORTER,
individually and as Administratrix of the Estate of
Walter L. Porter, deceased, JACOB POSEN, individually
and as Co-Administor of the Estate of Pamela Lynn Posen,
deceased, BONNIE J. GREGGE, individually and as
Co-Administrator of the Estate of Pamela Lynn Posen,
deceased, FLORENCIO QUIGUYAN, individually and as
Administrator of the Estate of Estrella C. Quiguyan,
deceased, GLENDON L. RAFFERTY, individually
and as Administrator of the Estate of
Bonnie Leigh Williams, deceased,
YVONNE REEVES, individually and as personal
Representative of the Estate of Anita Lynn Reeves,
OREGON ROGERS, individually and as Administrator of
the Estate of Lousie Ann Rogers, deceased,
JOHN FRICK ROOT, individually and as Administrator
of the Estate of Hanne-Maria Maijala Root, deceased,
MERYL SHAHUN ROSEN, individually and as Executrix
of the Estate of Saul M. Rosen, deceased,
CHARLES M. ROSENTHAL, individually and as
Administrator of the Estate of Andrea Victoria Rosenthal,
deceased, EUGENE A. SARACENI, individually and as
Administrator of the Estate of Elyse J. Saraceni, deceased,
FRANZISKA SCHAUBLE, individually and as personal
Representative of the Estate of Johnannes Otto Schauble,
deceased, INGRID HOSCHLE, individually and as
personal Representative of the Estate of
Johannes Otto Schauble, deceased,
PETRA SCHOLL, individually and as personal
Representative of the Estate of Johannes Otto Schauble,

deceased, JAMES L. SCHLAGETER, as Administrator of the Estate of Robert Thomas Schlageter, deceased, JOHN J. SCHULTZ, as Administrator of the Estate of Thomas Britton Schultz, deceased, MADELINE B. SHAPIRO, as Administratrix of the Estate of Amy Elizabeth Shapiro, deceased, GEORGE L. SHEANSHANG, individually and as Administrator of the Estate of Joan Sheanshang, deceased, CATHERINE SIGAL, individually and as Addministratrix of the Estate of Irving S. Sigal, deceased, PALMER N. SMITH, individually and as Administrator of the Estate of James A. Smith, deceased, ROOSEVELT SMITH, as personal Representative of the Estate of Mary E. Smith, deceased, HARVEY V. HALL, as Successor Executor of the Estate of Mary E. Smith, deceased, JOAN C. SMITH, individually and as Co-Administrator of the Estate of Cynthia Joan Smith, deceased, EDWARD F. SMITH, individually and as Co-Administrator of the Estate of Cynthia Joan Smith, deceased, DONALD R. STINNETT, Temporary Administrator of the Estate of Michael Gary Stinnett, DONALD R. STINNETT, individually, MARILYN I. SWAN, individually and as Administratrix of of the Estate of Anthony S. Swan, deceased, MICHAEL WOOLF TAGER, individually and as Administrator of the Estate of Marc Tager, deceased, TADASHI TANAKA, as Administrator of the Estate of Hidekazu Tanaka, deceased, EMI TANAKA, as Administrator of the Estate of Hidekazu Tanaka, deceased, IVY NG TRIMMER-SMITH COBB, individually and as Administratrix of the Estate of David W. Trimmer- Smith, deceased, VERA VAN TIENHOVEN, individually and as personal Representative of the Estate of Thomas F. Van Tienhoven,

deceased, SHIRIN ALAGHBAND VEJDANY, individually and as Administratrix of the Estate of Asaad Vejdany, deceased, MICHAEL WAIDO, individually and as Administrator of the Estate of Janine Waido, deceased, BARBARA MATTHEWS WEEDON, individually and as Administratrix of the Estate of Kesha Weedon, deceased, ROSANNE WESTON, individually and as Executrix of the Estate of Jerome Lee Watson, deceased, GEORGE H. WILLIAMS, individually and as Co-Administrator of the Estate of George W. Williams, deceased, HELENA R. WILLIAMS, individually and as Co-Administrator of the Estate of George W. Williams, deceased, JAMES K. WOLFE, Individually and as personal Representative of the Estate of Miriam L. Wolfe, deceased, ROSEMARY MILD, individually and as personal Representative of the Estate of Miriam L. Wolfe, deceased, EVERETT WOODS, individually, OLLIE WOODS, individually, BRENDA WOODS-PRUFF, individually and as Administratrix of the Estate of Joe Nathan Woods, Sr., deceased, BRENDA WOODS-PRUFF, individually and as Administratrix of the Estate of Joe Nathan Woods, Jr., deceased, BRENDA WOODS-PRUFF, individually and as Administratrix of the Estate of Chelsea Woods, deceased, ELAINE CATHERINE WRIGHT, individually and as Administratrix of the Estate of Andrew Christopher Gillies-Wright, deceased, VERONICA PATTIE, DONALD MOFFAT, MCGLASSON THOMAS MOFFAT, ANDREW MOFFAT, DOREEN YOUNG, MARGARET MOFFAT,PAUL G. ZWYNENBURG, as Administrator of the Estate of Mark J. Zwynenburg, deceased, VERA YOUNG, DIANE APFELBAUM, Individually and as Executor of the Estate of Martin Apfelbaum, deceased, JOHN BOLAND,

Individually and as Co-Administrator of the Estate of Stephen J. Boland, deceased, JANE BOLAND, Individually and as Co-Administrator of the Estate of Stephen J. Boland, deceased, GERALDINE G. BUSER, Individually and as Executrix of the Estate of Warren M. Buser, deceased, GERALDINE G. BUSER, Individually and as Administratrix of the Estate of Michael J. Buser, deceased, LEONARD COLASANTI, Individually and as Co-Administrators of the Estate of Gary Leonard Colasanti, JOANNE COLASANTI, Individually and as Co-Administrator of the Estate of Gary Leonard Colasanti, deceased, MARGARET HUGHSTON, Individually as surviving spouse and as Representative of the Estate of Willis Larry Coursey, deceased, ROSA LEE COURSEY, Individually and as mother of Willis Larry Coursey, deceased, ROSIE LEE COURSEY, Executrix of the Estate of Willis Washington Coursey post-deceased father of Willis Larry Coursey, deceased, EILEEN CARRIER, as Executrix of the Estate of Daniel O'Connor, deceased, JUDITH PAPPADOPOLOS, individually and as Executirx of the Estate of Christopher Papadopolos, deceased, WILLIAM H. JOHNSON, Individually and as Administrator Ad Prosequendum of the Estate of Timothy Baron Johnson, deceased,

Plaintiffs-Appellees,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, LIBYAN EXTERNAL SECURITY ORGANIZATION, also known as JSO, also known as Jamahiriya Security Organization, LIBYAN ARAB AIRLINES,

Defendants--Appellants,

LAMEN KHALIFA FHIMA, also known as Lamin, also known as A Al Amin Khalifa Fhima, ABDEL BASET ALI AL-MEGRAHI, also known as Baset, also known as Abdel Baset Ali Mohmed Al, also known as Abdel Baset Ali Mohamen,

Defendants,

UNITED STATES OF AMERICA,
Intervenor.

Before: CALABRESI and STRAUB, Circuit Judges, and TSOUCALAS, Judge.*

Appeal from a decision of the United States District court for the Eastern District of New York (Thomas C. Paltt, *J.*), denying defendants' motion to dismiss for lack of subject matter jurisdiction and lack of personal jurisdiction or, in the alternative, to dismiss certain claims for failure to state a claim on which relief can be granted.

Affirmed in part and dismissed in part.

CALABRESI, *Circuit Judge*:

Defendants-appellants, collectively "Libya," appeal from the denial of their motion to dismiss. The plaintiffs, who are the survivors and representatives of persons killed aboard Pan Am 103 above Lockerbie, Scotland, brought suit against Libya alleging wrongful death, pain and suffering, and a variety of other injuries. Libya moved to dismiss for lack of subject matter jurisdiction, contending that 28 U.S.C. § 1605(a)(7), the provision of the Foreign Sovereign Immunities Act ("FSIA") on which jurisdiction is alleged to

---

* The Honorable Nicholas Tsoucalas, Judge of the United States Court of International Trade, sitting by designation.

be founded, is void as an unconstitutional delegation of the power to establish the jurisdiction of the federal courts. It also sought dismissal for lack of personal jurisdiction or, if its jurisdictional challenges failed, dismissal of certain of the plaintiffs' claims for failure to state a claim on which relief could be granted. The district court denied all aspects of the motion to dismiss, and Libya appealed. We conclude that we have no jurisdiction, on this interlocutory appeal, to review any of the issues that Libya raised in its motion to dismiss other than its challenge to subject matter jurisdiction. We therefore dismiss so much of the appeal as raises these other issues. With respect to the question of subject matter jurisdiction, we find that § 1605(a)(7) is constitutional as applied in this case. We therefore affirm the district court's ruling that it has subject matter jurisdiction over Libya.

BACKGROUND

On December 21, 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland. All 259 persons on board were killed, as were eleven people on the ground below. The two men named as individual defendants in this suit, both of whom are Libyan, have been indicted in the United States and the United Kingdom in connection with the bombing. Negotiations are currently in progress among the United States, the United Kingdom, and Libya to hold a criminal trial in the Netherlands at which those two men would be tried under Scottish law for allegedly perpetrating the bombing.

In 1994, some of the present plaintiffs brought suit against some of the present defendants, claiming that Libya and its agents were responsible for destroying Pan Am 103. Libya moved to dismiss for lack of jurisdiction under the FSIA or any other applicable law. The FSIA establishes

that foreign states are generally immune from suit.[1] But it gives the federal district courts jurisdiction over actions against such states when either §§ 1605-07 of the Act or relevant international agreements permit them to be sued.[2] Sections 1605-07 enumerate categories of cases in which foreign states are not entitled to sovereign immunity and are, therefore, subject to district court jurisdiction. When the previous litigation was brought in 1994, no provision of the FSIA deprived Libya of sovereign immunity in suits of this sort. Accordingly, the United States District Court for

---

[1] 28 U.S.C. § 1604 (1994), a provision of the FSIA, reads, in its entirety:

> "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

[2] 28 U.S.C. § 1330(a) (1994), another provision of the FSIA, reads, in its entirety:

> "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."

Although this language could be read to mean that civil actions are divided into jury and nonjury actions, and that, under this section, the district courts have jurisdiction only in nonjury actions, we have in fact read it to mean (1) that the district courts have jurisdiction over civil actions against foreign states regardless of whether those actions, if brought against domestic defendants, would be jury or nonjury actions, and (2) that all such actions are to be tried without juries. *See Bailey v. Grand Trunk Lines New England*, 805 F.2d 1097, 1101 (2d Cir.1986); *Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui,"* 639 F.2d 872, 875-76 (2d Cir.1981).

the Eastern District of New York (Platt, *J.*) dismissed the case for lack of subject matter jurisdiction. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F.Supp. 306 (E.D.N.Y.1995). We affirmed. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir.1996), cert. denied, — U.S. —, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997).

In 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") amended the FSIA by adding what is now 28 U.S.C. § 1605(a)(7). Under this new section, foreign states that have been designated as state sponsors of terrorism are denied immunity from damage actions for personal injury or death resulting from aircraft sabotage.[3] Shortly after passage of the AEDPA, the present plaintiffs

---

[3] 28 U.S.C. § 1605 (Supp.1996), another provision of the FSIA, reads, in pertinent part:

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .
>
> (7) . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—
>
> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C.App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act[.]"

filed (against the present defendants) substantially the same claims that had been previously dismissed.

The defendants moved to dismiss for lack of subject matter jurisdiction and lack of personal jurisdiction and, in the alternative, to dismiss some of the plaintiffs' claims for failure to state a claim on which relief could be granted. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F.Supp. 325, 327 (E.D.N.Y.1998). With respect to subject matter jurisdiction, the defendants claimed that the 1996 amendment to the FSIA was unconstitutional and hence could not create subject matter jurisdiction over Libya. The challenge to personal jurisdiction was based on due process and specifically on the theory-of minimum contacts.

On February 26, 1998, the district court denied the defendants' motion to dismiss. Judge Platt ruled (1) that his court had subject matter and personal jurisdiction over the defendants, (2) that the FSIA amendments were constitutional, (3) that pendent jurisdiction existed over the plaintiff's claims for battery and other common-law torts, and (4) that no portion of the action should be dismissed for failure to state a claim. *Id.* at 332.

Libya now appeals.

DISCUSSION

Libya has raised several issues on this interlocutory appeal, but most of them are not properly before us at this time. Before turning to the merits, therefore, we examine our jurisdiction to review the different aspects of the district court's decision. We conclude that we currently lack jurisdiction to consider any of the appealed issues other than that of sovereign immunity as a defense to subject matter jurisdiction. We then address the subject matter jurisdiction claim.

I.

(A) Interlocutory appeal and the collateral order exception

This appeal is interlocutory, but our jurisdiction is not founded on the interlocutory appeals statute. 28 U.S.C. § 1292(a) permits interlocutory appeals regarding injunctions, receiverships, and admiralty issues, none of which is present in this case. 28 U.S.C. § 1292(b) permits interlocutory appeals under certain circumstances when a district judge certifies issues for immediate review, but Judge Platt did not make any such certification in this case. As a result, § 1292 does not apply.

Instead, our jurisdiction is founded on the "collateral order" exception to the final order rule. Under this exception, an interlocutory appeal is available for "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The Supreme Court has articulated a three-pronged test for determining when the collateral order exception applies. To qualify, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

The denial of Libya's motion to dismiss on the grounds of sovereign immunity is appealable as a collateral order. *See Hanil Bank v. PT. Bank Negara Indonesia*, (Persero), 148 F.3d 127, 130 (2d Cir.1998). It is easy to see why the

district court's ruling on sovereign immunity meets the first two prongs of *Coopers & Lybrand*. It conclusively determines the issue of subject matter jurisdiction, thus satisfying the first prong, and the issue of jurisdiction is separate from the merits, thus meeting the second.

The reason why that ruling meets the third prong is a bit more complex. When an ordinary, non-sovereign litigant's motion to dismiss for lack of jurisdiction is denied, the denial is entirely reviewable on appeal from final judgment. That is why denials of motions to dismiss for jurisdictional reasons cannot ordinarily be the subject of interlocutory appeals. *See, e.g., Van Cauwenberghe v. Biard*, 486 U.S. 517, 527, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988); *United States v. Levy*, 947 F.2d 1032, 1034 (2d Cir.1991); *United States v. Layton*, 645 F.2d 681, 683 (9th Cir.1981). But when the jurisdictional issue is one of immunity, including sovereign immunity, appeal from final judgment cannot repair the damage that is caused by requiring the defendant to litigate. "[S]overeign immunity is an immunity from trial and the attendant burdens of litigation[.]" *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C.Cir.1990) (quoting *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n. 2 (7th Cir.1989)). A sovereign that is required to litigate a case on the merits before it can appeal the assertion of jurisdiction over it has not been afforded the benefit of the immunity to which it is entitled. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (making the same point in the context of the sovereign immunity of the states under the Eleventh Amendment). For this reason we have jurisdiction, on an interlocutory appeal, to review Libya's challenges to subject matter jurisdiction in this case. *See Hanil Bank*, 148 F.3d at 130.

It does not follow, however, that we also have jurisdiction to review all of the other aspects of the district court's order on the same interlocutory appeal. The issue of sovereign immunity as a bar to subject matter jurisdiction is within the "collateral order" exception to the final order rule, but the other issues addressed in the parties' briefs—including personal jurisdiction, substantive liability, and punitive damages—are not. The rationale for permitting interlocutory appeal of the sovereign immunity issue does not apply to these other questions. Nor does some other rationale enable these issues to meet the three requirements of *Coopers & Lybrand*. The argument that the plaintiffs have failed to state a valid claim fails the second prong, because it is not separate from the merits of the case. And all of the issues (other than sovereign immunity as an objection to subject matter jurisdiction) fail the third prong, because they can be reviewed effectively on appeal from final judgment.

(B) *Swint*

1. Limitations on pendent interlocutory review

The Supreme Court has, moreover, recently directed the Courts of Appeals not to take "pendent appellate jurisdiction" on interlocutory appeals of issues not themselves immediately appealable. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). In *Swint*, the district court denied qualified immunity to county officials. Denials of qualified immunity are immediately appealable,[4] and, accordingly,

---

[4] The reason why denials of qualified immunity are generally appealed immediately is analogous to the reason why interlocutory review is available for denial of sovereign immunity. Qualified immunity, like sovereign immunity, is an immunity from litigation and not just from liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

several of the county officials appealed. Their employer, the defendant County Commission, asked the appellate court to exercise "pendent appellate jurisdiction" and to rule at the same time on the County's motion for summary judgment. It requested review regardless of whether there was any independent basis for immediate consideration of its appeal. *Id.*, 514 U.S. at 40, 115 S.Ct. 1203.

The Supreme Court held unanimously that the appellate court, on interlocutory review, lacked jurisdiction over the County's summary judgment motion and could not reach out and decide that issue in the interest of judicial economy. "[C]ourts of appeals," the Court explained, do not have "discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court." *Id.*, 514 U.S. at 47, 115 S.Ct. 1203. The Court went on to describe the mischief that might result from a contrary decision: "[A] rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.*, 514 U.S. at 49-50, 115 S.Ct. 1203. That, the Court opined, would eviscerate both the statutory scheme of § 1292, *see Swint*, 514 U.S. at 47, 115 S.Ct. 1203, and the more general principle that, with only limited exceptions, appeals in the federal system should be limited to the review of final orders.

2. Pendent parties v. pendent issues

Both Libya and the plaintiffs attempt to distinguish *Swint* from the present appeal. They note, among other things, that in *Swint* the party that tried to raise the jurisdictionally insufficient issue was not the same party that appealed the jurisdictionally sufficient one. In the present case, a single party—Libya—raises all the issues offered for

interlocutory review. To put the point in doctrinal terms, the *parties* would have us distinguish the pendency of parties from the pendency of issues. But the fact that it is possible to differentiate the two, without more, does not provide a reason why the latter kind of pendency should be treated more permissively than the former.[5]

The Supreme Court explained in *Swint* that the reason why courts of appeals should not take pendent jurisdiction over issues that do not independently qualify for the collateral order exception is that parties should not be encouraged "to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.*, 514 U.S. at 49-50, 115 S.Ct. 1203. A system in which parties could get immediate appellate review of multiple issues once the door was opened for review of one issue would tempt such parties to rummage for rulings that would authorize

---

[5] The Court in *Swint* discussed several prior cases in which courts had faced the issue of pendent jurisdiction on interlocutory appeal, and, in doing so, it did not differentiate between cases involving pendent issues and those involving pendent parties. An example is *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The petitioner in *Abney* was a criminal defendant who was authorized under the collateral order doctrine to bring an interlocutory appeal of the denial of his motion to dismiss an indictment on double jeopardy grounds. He also sought to raise another issue, challenging the sufficiency of the indictment. The Supreme Court held that the Court of Appeals lacked authority to review the latter claim on interlocutory appeal. *See id.*, 431 U.S. at 662-63, 97 S.Ct. 2034. *Swint* presented *Abney* as an illustration of the proper approach to questions of pendent jurisdiction on interlocutory appeal. *See Swint*, 514 U.S. at 49, 115 S.Ct. 1203. But the motion challenging the sufficiency of the indictment and the motion alleging double jeopardy were both raised by the same party: the defendant. Thus, the rule of *Swint* seems not to be limited to the pendency of *parties*. It applies as well to the pendency of *issues*.

interlocutory appeals, thereby securing appellate decisions on many issues without having to wait until after trial.

It is clear that pendent issues raised by the party that has the right to bring an interlocutory appeal are at least as great a threat to the final-order scheme as are pendent issues raised by other parties. Indeed, it appears, if anything, more likely that one party will appeal a flimsy collateral issue with the intention of obtaining interlocutory review for other issues it presses than that different parties will conspire to secure early appellate rulings. The likelihood of one party opening the door and the other party walking through with its otherwise jurisdictionally insufficient claims seems less great than that of one party, having gotten its foot in the door, seeking to bring in everything else it has. We conclude, therefore, that the contention that *Swint* bars pendent interlocutory appellate jurisdiction with regard to pendent parties but does not reach pendent issues gets the relationship between those two categories backwards, and that the Supreme Court's restriction on pendent parties applies, a *fortiori*, to pendent issues raised by a single party. Pendency of parties may appear more *complicated* than pendency of issues, but under *Swint*, it is the pendency of issues that is more dangerous.

3. Judicial discretion

To be sure, *Swint* did not create an absolute bar to interlocutory appeals of all issues not independently warranting immediate review. It suggested instead that (a) where an issue is "inextricably intertwined" with a question that is the proper subject of an immediate appeal, or (b) where review of a jurisdictionally insufficient issue is "necessary to ensure meaningful review" of a jurisdictionally sufficient one, an appellate court may exercise pendent jurisdiction. *Id.*, 514 U.S. at 51, 115 S.Ct. 1203. We have

read that suggestion restrictively and have held that the two phrases quoted above specify the only circumstances in which we can review immediately an issue that does not independently qualify for interlocutory appeal. *See, e.g., Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1049 (2d Cir.1997). Most of our sister circuits have also adopted a restrictive understanding of the exceptions to *Swint*'s general rule. *See, e.g., Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir.1998); *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir.1998), cert. denied — U.S. — 119 S.Ct. 408, — L.Ed.2d — (1998); *Thornton v. General Motors Corp.*, 136 F.3d 450, 453 (5th Cir.1998) (per curiam); *Woolfolk v. Smith*, 81 F.3d 741, 743 (8th Cir.1996) (per curiam); *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir.1996); *Sevier v. City of Lawrence*, 60 F.3d 695, 701 (10th Cir.1995); *L.S.T., Inc. v. Crow*, 49 F.3d 679, 683 n. 8 (11th Cir.1995).

The D.C. Circuit, in contrast, has given *Swint* a more permissive reading. *See Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675 (D.C.Cir.1996) (per curiam). As a result, on one occasion it has exercised jurisdiction on an interlocutory appeal in circumstances very similar to those now before us. *See Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020 (D.C.Cir.1997). A footnote in *Gilda Marx* had suggested that "inextricably intertwined" and "necessary to ensure meaningful review" should not be considered "a definitive or exhaustive list of conditions" under which *Swint* permits the exercise of pendent appellate jurisdiction. *See Gilda Marx*, 85 F.3d at 679 n.4. *Jungquist* expanded on that dictum. It held that an appellate court has discretion to exercise pendent jurisdiction on interlocutory appeals when doing so would serve the "interests of fairness and efficiency." *See Jungquist*, 115 F.3d at 1027. It specified, moreover, that

such pendent jurisdiction may exist even over issues that are not inextricably intertwined with issues that formed the basis for permissible interlocutory review.

The question in *Jungquist* was whether the court could review a challenge to personal jurisdiction on the same interlocutory appeal in which it considered a defense of sovereign immunity under the FSIA. Although it rejected the sovereign immunity defense with respect to certain defendants, and therefore established that, as to them, subject matter jurisdiction existed, *id.* at 1028, the court noted that it could conclude the case and spare everyone the need to litigate further by considering the personal jurisdiction question, finding no such jurisdiction, and dismissing on those grounds. *Id.* at 1027. And so it did. *Id.* at 1032-33.

We believe that the D.C. Circuit misinterpreted *Swint*. *Jungquist* would reserve to the courts of appeals a large measure of discretion in deciding when to review pendent issues on immediate appeals of collateral orders. Yet the Supreme Court in *Swint* expressly stated that affording the appellate courts such discretion would undermine the statutory scheme governing interlocutory review. *See Swint*, 514 U.S. at 47, 115 S.Ct. 1203; *see also id.* at nn.4-5 (discussing congressional rejection of the idea that courts of appeals should have discretion of this sort).

Accordingly, and adhering to our existing understanding of *Swint* and its exceptions, we hold that when a party takes an interlocutory appeal under the collateral order exception, and that party or any other party seeks simultaneous consideration of another issue that is not independently entitled to interlocutory review, we may not, under *Swint*, take jurisdiction over the latter issue unless it is inextricably intertwined with, or—what is essentially the

same thing—its review is necessary to ensure meaningful review of, the former issue.[6] We further hold that this remains the case even if considerations of efficiency argue for deciding both issues on interlocutory review.

(C) Relationship between subject matter jurisdiction and personal jurisdiction

1. Extricability

Accordingly, we now inquire whether any of the other issues Libya has raised are inextricably intertwined with its claim of sovereign immunity (that is, with its defense to subject matter jurisdiction). We begin with the question of personal jurisdiction. It is true, as the parties urge, that the two kinds of jurisdiction—subject matter and personal—are interrelated under the FSIA. Pursuant to that statute, there is personal jurisdiction over foreign sovereigns with respect to all claims (a) over which there is subject matter jurisdiction, and (b) as to which process has been properly served. 28 U.S.C. § 1330(b). In other words, the statute makes both service of process and subject matter jurisdiction elements of personal jurisdiction over foreign sovereigns.

It does not follow, however, that a court cannot decide issues of subject matter jurisdiction without at the same time making definitive findings as to personal jurisdiction. For instance, a court could find subject matter jurisdiction without passing on whether there had been effective service of process, thus leaving the personal jurisdiction question

---

[6] Thus, we have held that the question of whether a public official defending against a civil suit is entitled to qualified immunity is inextricably intertwined with a determination of what the plaintiff's clearly established rights were. *See McEvoy v. Spencer*, 124 F.3d 92, 96 (2d Cir.1997); *Kaluczky v. City of White Plains*, 57 F.3d 202, 207 (2d Cir.1995).

open. The current case presents a different example of the same point. Libya's challenge to personal jurisdiction is based on due process and the principle of minimum contacts. We can readily decide whether the district court had subject matter jurisdiction over Libya without at all considering whether it would violate due process to subject Libya to personal jurisdiction. Because review of the latter is not necessary for review of the former, we conclude that the issues of subject matter jurisdiction and personal jurisdiction are not inextricably intertwined in this case.

2. Impact of foreign sovereignty

The plaintiffs claim, however, that the special nature of suits against foreign sovereigns renders review of the subject matter jurisdiction issue less than meaningful if there is no simultaneous resolution of the personal jurisdiction question. One could understand this argument as having two strands, the first of which is addressed to Libya's *foreignness* and the second of which goes to its *sovereignty*. First, the plaintiffs argue that a foreign sovereign claiming immunity from suit in an American court may justifiably fail to see the distinction between the two kinds of jurisdiction. All that sovereign is interested in is whether the suit will proceed or not. In other words, counsel for the plaintiffs suggests that we should not insist on procedural niceties that from Libya's point of view are either too subtle to be grasped or too provincial to be easily understood.

We reject this contention. It is, in essence, a claim that we should not apply general principles of our law to Libya because Libya, as a foreign litigant, might not comprehend them. But we have no reason to think that sovereign states are less able to understand basic principles of American law than are other litigants. Instead, it seems likely that a foreign nation that maintains laws and courts of its own has

considerably greater legal sophistication than do most ordinary plaintiffs and defendants. Moreover, Libya does not appear before this court *pro se*. It has hired distinguished professional counsel whose office it is to explain the law to its client.

The second aspect of this argument is, in essence, that if we are going to release the defendant sovereign from our jurisdiction on appeal from a final order, the comity that one government owes to another instructs that we do so now, thus sparing the sovereign the expense and embarrassment of litigation. This contention might be in point if the litigant to which it was applied were entitled to sovereign immunity. But if Libya were entitled to sovereign immunity, the case would be dismissed for lack of subject matter jurisdiction. And then the question of whether we could review personal jurisdiction interlocutorily would be moot. That question will only be before us if we decide—as we do today—that Libya is not entitled to immunity from the present suit. Once we have adjudicated the sovereign immunity question and concluded that there is no immunity, Libya cannot procure dismissal by pressing its failed claim to immune status under another heading (*i.e.*, that of personal rather than subject matter jurisdiction).

3. *Hanil Bank*

This court has, on one occasion since *Swint*, decided the question of personal jurisdiction over a foreign sovereign at the same time that it reviewed the issue of subject matter jurisdiction on interlocutory appeal. *See Hanil Bank*, 148 F.3d at 127. The defendant in *Hanil Bank* raised sovereign immunity as a defense to subject matter jurisdiction under the FSIA. *See id.* at 130. The district court rejected that defense, and the defendant, like Libya, took an interlocutory appeal. *Id.* We affirmed the finding of

subject matter jurisdiction, addressed the question of personal jurisdiction, and concluded that personal jurisdiction was also present. *Id.* at 134. Accordingly, *Hanil Bank* might seem to be authority for the proposition that, under the FSIA, personal jurisdiction and subject matter jurisdiction are interrelated sufficiently to justify the exercise of pendent appellate jurisdiction.

But there is a crucial difference between *Hanil Bank* and the present case. Subject matter jurisdiction in *Hanil Bank* was founded on 28 U.S.C. § 1605(a)(2), the "commercial activity exception" to sovereign immunity. *Hanil Bank*, 148 F.3d at 130-31. Subject matter jurisdiction in the case *sub judice* is allegedly founded on aircraft sabotage under § 1605(a)(7). These are both provisions of the same statute, but they require widely different showings to establish jurisdiction. The commercial activity exception defeats sovereign immunity, and thereby establishes subject matter jurisdiction, in actions based on commercial activities conducted either in the United States or, if outside the United States, then with a "direct effect" on the United States. 28 U.S.C. § 1605(a)(2)(1994). The facts of *Hanil Bank* fit within the commercial activities exception, the court found, because they concerned the non-payment of a letter of credit that was to be paid in U.S. dollars into a bank account in New York City. *Id.* at 129-30, 132-33.

Once the court made that determination in *Hanil Bank*, it necessarily had also decided that the defendant had minimum contacts with the United States sufficient to establish personal jurisdiction over it in an American forum without violating the requirements of due process. By agreeing to make payment in New York, *id.* at 132, and in American currency, *id.* at 130, the defendant had "purposefully avail[ed] itself of the privilege of conducting

activities within the [United States]." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). This was enough to establish the necessary minimum contacts for personal jurisdiction.

The issue of personal jurisdiction in *Hanil Bank* turned exclusively on due process grounds. *Id.* at 134.[7] The finding of subject matter jurisdiction under the commercial activities exception also entailed a finding of minimum contacts, and that finding was therefore conclusive on the personal jurisdiction question as well.[8] In other words, the issues of subject matter jurisdiction and personal jurisdiction were inextricably intertwined, because the court could not have answered the former without saying everything that was required to answer the latter. Indeed, in *Hanil Bank* the

---

[7] Earlier in the litigation, there had also been a challenge to personal jurisdiction on the grounds that service of process had been insufficient, but that issue disappeared after the district court allowed the plaintiff extra time to perfect its service. *See Hanil Bank*, 148 F.3d at 130.

[8] The Supreme Court has declined to hold that the "direct effects" requirement of the commercial activities exception incorporates the "minimum contacts" test. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). (It has also declined to hold the contrary. *See id.*) It is thus possible that a foreign sovereign could be subject to subject matter jurisdiction under the commercial activities exception without being within the personal jurisdiction of an American court. But *Hanil Bank* did not present thatscenario. The findings that underlay subject matter jurisdiction in *Hanil Bank* involved *purposeful availment* and hence minimum contacts. *See Hanil Bank*, 148 F.3d at 130, 132; *see also Weltover*, 504 U.S at 619-20, 112 S.Ct. 2160 (foreign sovereign that issued debt instruments payable in U.S. currency, payable in New York, and appointed agent for transaction in New York had "purposefully availed itself of the privilege of conducting activities within the United States" (internal quotation marks and brackets omitted)).

issues were more than inextricably intertwined: they were essentially identical.

The elements of § 1605(a)(7), unlike those of the commercial activities exception as applied in *Hanil Bank*, do not entail any finding of minimum contacts. As a result, in the present case, we can easily decide subject matter jurisdiction and leave key issues of personal jurisdiction unresolved. The two questions are, therefore, not inextricably intertwined. We conclude that, under *Swint*, we lack authority to decide the issue of personal jurisdiction on this interlocutory appeal.

(D) Bill of Attainder and *ex post facto* law challenges

Libya argues that § 1605(a)(7) is unconstitutional as a bill of attainder and as an *ex post facto* law. If that contention challenged the validity of § 1605(a)(7) *tout court*, it would properly be before us on this appeal, because it would constitute an attack on the source of subject matter jurisdiction. As it happens, however, the bill of attainder and *ex post facto* issues are germane, if at all, only to the potential imposition of punitive damages in this suit and not to the existence of jurisdiction. As such, they are not inextricably intertwined with the one issue that is properly before us.

For a law to be unconstitutional as a bill of attainder, it must impose punishment. *See Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984) (defining bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial") (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977)). The same is true

for a law to be unconstitutional under the *Ex Post Facto Clause*. *See Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (*Ex Post Facto* clause "applies only to penal statutes"); *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir.1997), *cert. denied*,— U.S.—, 118 S.Ct. 1066, 140 L.Ed.2d 126 (1998) (" 'Ex post facto' is a term of art applicable only to 'punishment'—legislative action that retroactively 'punishes as a crime an act previously committed, which was innocent when done,' 'makes more burdensome the punishment for a crime, after its commission,' or 'deprives one charged with crime of any defense available according to law at the time when the act was committed.' "). To assess Libya's argument that § 1605(a)(7) is unconstitutional as a bill of attainder and an ex post facto law, we must therefore ascertain whether and how § 1605(a)(7) might be a penal statute.

It is not the case that § 1605(a)(7) imposes punishment (in the relevant sense) simply by subjecting Libya to jurisdiction.[9] Moreover, the burdens of litigation do not of themselves generally constitute "punishment." *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 526 (1988). Once a party's immunity has been removed, and before there is an adverse judgment of guilt or liability, being haled into court does not without more violate that party's cognizable rights. *See id.*; *see also Nixon*, 433 U.S. at 472, 97 S.Ct. 2777 (burdensome circumstances alone, without a judgment of guilt or liability, are not enough to constitute "punishment" under the Bill of Attainder Clause).[10]

---

[9] At oral argument, Libya in effect conceded as much.

[10] This remains so even if it turns out, on appeal, that the party was not subject to jurisdiction. *See Van Cauwenberghe*, 486 U.S. at 526, 108 S.Ct. 1945. And it makes no difference whether the jurisdiction to which the party is not subject is personal jurisdiction or jurisdiction over

Moreover, as the Supreme Court has explained, even a finding of civil liability and the attendant imposition of compensatory damages does not suffice to make the retrospective application of a law invalid. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 281, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Where a retroactive law is civil rather than criminal, it is only the imposition of *punitive* damages that might, in particular circumstances, raise a constitutional problem. *Id*; *see also United States v. Ward*, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980) (where penalties are presented as civil rather than criminal, there can be no *ex post facto* issue without "the clearest proof" that "the statutory scheme was so punitive in purpose or effect as to negate" the legislature's designation of the law as civil). Not surprisingly, therefore, Libya focuses its bill of attainder and *ex post facto* claims on the possibility that Libya will be subjected to punitive damages under § 1605(a)(7).

But if it is only the possibility that punitive damages may be assessed that raises the question of the statute's being a bill of attainder or an *ex post facto* law, then those issues are not properly before us at this stage of the case. There has as yet been no trial on the merits and no finding of liability, let alone a punitive damage award. If Libya prevails at trial, these constitutional questions will be moot. The same will be true even if the plaintiffs prevail, should they be awarded only compensatory damages. More important, from the standpoint of the *Cohen* factors, if punitive damages are in the end assessed, there will be

---

the subject matter. As long as a defendant is not entitled to *immunity*, and therefore privileged against litigation itself, it suffers no legal wrong by the mere fact of suit. As a result, any lack of jurisdiction may be adequately addressed on appeal from a final order. *See id.*

ample opportunity to consider both the bill of attainder and the *ex post facto* challenges on appeal from a final order.

Accordingly, the challenges to § 1605(a)(7) as a bill of attainder and as an *ex post facto* law are neither independently eligible for immediate review under the collateral order exception (because they can be effectively reviewed on appeal from final order) nor inextricably intertwined with the sovereign immunity issue (because a challenge to punitive damage awards under a statute is not a challenge to jurisdiction under that statute). On this interlocutory appeal, and again applying *Swint*, those issues are not properly before us.

(E) Failure to state a claim

Finally, Libya contends that some of the plaintiffs' claims fail to state claims on which relief can be granted. We do not address this issue. A motion to dismiss for failure to state a claim is not independently reviewable on interlocutory appeal, *see Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994), and this argument too is manifestly separable from the issue of sovereign immunity.[11]

---

[11] That would not be so if the argument that the plaintiffs failed to state a claim asserted that a necessary ground for deprivation of immunity under the FSIA were lacking. Thus, if a foreign sovereign were sued for an airline crash on a negligence theory, rather than on a theory of sabotage, the defendant could assert that even if everything in the complaint were taken as true, there would be no jurisdiction, because § 1605(a)(7) removes sovereign immunity only for claims arising out of aircraft *sabotage* and not for air disasters generally. In such circumstances, a defendant's motion to dismiss for failure to state a claim might well be inextricably intertwined with the issue of sovereign immunity and hence jurisdiction. Whether the question of immunity would then be sufficiently independent of the merits to meet the second prong of *Cohen* need not be considered today.

II.

The one aspect of the district court's order that we can review on this appeal is that court's decision that § 1605(a)(7) does not unconstitutionally delegate legislative power by allowing the existence of subject matter jurisdiction over foreign sovereigns to depend on the State Department's determinations of whether particular foreign states are sponsors of terrorism. That decision we review *de novo*. *See United States v. Murphy*, 979 F.2d 287, 289 (2d Cir.1992).

Section 1605(a)(7) abrogates sovereign immunity in damage actions for personal injury or death arising out of, *inter alia*, acts of aircraft sabotage, provided that the defendant has been designated a state sponsor of terrorism under 50 U.S.C.App. § 2405(j) or 22 U.S.C. § 2371. Designations under these statutes are made by the Secretary of State for the purposes of regulating, respectively, exports and foreign aid. But since the passage of § 1605(a)(7) in 1996, the Secretary's designations affect sovereign immunity as well. And that, Libya contends, results in an unconstitutional delegation of a core legislative power: the power to determine the subject matter jurisdiction of the federal courts.

The district court ruled that § 1605(a)(7) does not unconstitutionally delegate the power to confer jurisdiction because § 1605(a)(7) does not determine jurisdiction at all. It simply deprives Libya, the court said, of an affirmative

defense, that of sovereign immunity. *Rein*, 995 F.Supp. at 328-329.[12] To reach that conclusion, it severed two concepts that the Supreme Court has, however, told us must be treated together: sovereign immunity and subject matter jurisdiction. Thus, the Supreme Court has held that sovereign immunity (or, more precisely, the absence of sovereign immunity) is an element of subject matter jurisdiction under the FSIA. *See Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94 & n. 20, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). That is why Libya's assertion of sovereign immunity is offered as a defense to subject matter jurisdiction. As *Verlinden* also made clear, sovereign immunity is not an affirmative defense to suits under the FSIA; it is, instead, a matter of direct jurisdictional moment. *Id.*[13] The power to abrogate (or confer) sovereign immunity is, under the FSIA, therefore the power to confer

---

[12] The district court also appeared to suggest that § 1605(a)(7) delegated no more than advisory authority on jurisdiction, leaving the courts with discretion to entertain or ignore a defense of sovereign immunity in the case of countries designated as state sponsors of terrorism. *See Rein*, 995 F.Supp. at 329. This approach, however, misreads the statute, which provides that countries so designated "*shall not* be immune from the jurisdiction of courts of the United States" in cases arising from aircraft sabotage or the other circumstances there identified. 28 U.S.C. § 1605(a)(7) (emphasis added). The language of the statute leaves no room for a court to exercise discretion in the way envisioned by the district court.

[13] This position is consistent with the Court's recent jurisprudence of sovereign immunity in another context: that of suits against states in federal courts. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that the sovereign immunity of states is a jurisdictional issue, not an affirmative defense).

(or abrogate) jurisdiction.[14] It follows that the delegation problem cannot be avoided by the reasoning of the district court.

Section § 1605(a)(7), as applied in this case, nonetheless withstands constitutional scrutiny for a different reason. And it does so despite the fact that how far Congress may go in delegating authority to designate or limit the jurisdiction of the federal courts is a complex question that has not yet received a definitive answer.

More than one circuit court has expressed doubts as to whether Congress can constitutionally delegate such a core power as the power to control the jurisdiction of the federal courts. *See Miller v. F.C.C.*, 66 F.3d 1140, 1144 (11th Cir.1995); *United States v. Mitchell*, 18 F.3d 1355, 1360 n.7 (7th Cir.1994). Despite these doubts, however, the Supreme Court on one occasion long ago upheld the existence of federal court jurisdiction even though that jurisdiction depended on a factual determination that had been delegated to the Department of State. *See Jones v. United States*, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691

---

[14] The district court also made another attempt to construe the FSIA in a way that would prevent § 1605(a)(7) from involving the power to determine jurisdiction: it maintained that the FSIA is actually not a jurisdiction-setting statute at all. Jurisdiction over suits against foreign sovereigns, the district court stated, is conferred on the federal courts by Article III of the Constitution, and the FSIA merely confirms that jurisdiction. *Rein*, 995 F.Supp. at 328-29. If that were the case, and the FSIA were not a jurisdictional statute, then delegating the power to determine the scope of the FSIA would not affect the bounds of federal jurisdiction. But it is well established that the FSIA is the source of jurisdiction over actions against foreign states, just as 28 U.S.C. § 1331 is the source of jurisdiction over federal question cases and 28 U.S.C. § 1332 is the source of jurisdiction over diversity claims. *See Ruggiero*, 639 F.2d at 876. Accordingly, the power to determine the applicability of the FSIA can indeed be the power to set the jurisdiction of the federal courts.

(1890). And this court recently denied jurisdiction on the basis of an analogous finding by the executive branch. See *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir.1997), *cert. denied* — U.S. —, 118 S.Ct. 883, 139 L.Ed.2d 871 (1998).

The first case occurred more than a hundred years ago, when a man named *Jones* was indicted in federal court for a murder that occurred on the Caribbean island of Navassa. *See Jones*, 137 U.S. at 216, 11 S.Ct. 80. Jurisdiction to try Jones in an American court depended on the island's status as American territory. The Secretary of State had recently deemed Navassa an island "appertaining to the United States." *Id.* at 217, 11 S.Ct. 80. He had made that announcement pursuant to the Guano Islands Act of 1856, § 1, which empowered the President to declare Caribbean guano islands American. *See id.* at 209, 11 S.Ct. 80. The Supreme Court held that such a declaration could be made "through the Department of State, whose acts in this regard are in legal contemplation the acts of the president." *Id.* at 217, 11 S.Ct. 80. The Court went on to hold that the Secretary's statement did in fact make the island one "appertaining to the United States" and that jurisdiction over Jones's crime was therefore proper. *Id.* at 224, 11 S.Ct. 80.

The second case occurred a year ago, when this court held that alienage jurisdiction—*i.e.*, jurisdiction, under the relevant provision of the diversity statute, in suits between Americans and citizens or subjects of foreign states—could depend on a decision by the executive as to whether a foreign entity is a "state." *See Matimak*; *see also* 28 U.S.C. § 1332(a)(2) (establishing alienage jurisdiction). The plaintiff was a Hong Kong corporation, and whether alienage jurisdiction applied turned on whether Hong Kong,

its place of citizenship, qualified as a foreign state. *See Matimak*, 118 F.3d at 79. The diversity statute does not define "foreign state," nor does it say who has the power to identify foreign states for diversity purposes. Our court held that recognizing foreign states and governments is a function of the executive branch, on whose determination, therefore, the existence of jurisdiction depended. Since the executive had not recognized Hong Kong as a state, diversity jurisdiction was denied. *See id.* at 82-84.

We believe that the Seventh and Eleventh Circuits' expressions of concern are, in fact, reconcilable with the *Jones* and *Matimak* cases. But we need not attempt such a reconciliation today, because in the particular case before us there was no delegation at all. The decision to subject Libya to jurisdiction under § 1605(a)(7) was manifestly made by Congress itself rather than by the State Department. At the time that § 1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism. No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103. That jurisdiction existed the moment that the AEDPA amendment became law.

The issue of delegation might be presented if another foreign sovereign—one not identified as a state sponsor of terrorism when § 1605(a)(7) was passed—was placed on the relevant list by the State Department and, on being sued in federal court, interposed the defense that Libya now raises. It might also arise if a state on the list when § 1605(a)(7) was enacted was later dropped from the list. In that scenario, a *plaintiff* could put forth a claim of unduly delegated authority. But Libya has no similar complaints in the case before us. For that reason, we need not now express any opinion on whether such hypothetical cases

would fall within the ambit of *Jones* and *Matimak* or would, instead, implicate the doubts expressed by the Seventh and Eleventh Circuits. As here applied to Libya, § 1605(a)(7) creates jurisdiction directly at the behest of Congress and without any intervening decision by another body. Accordingly, we find no delegation of legislative power and, necessarily, no unconstitutional delegation either.

III.

The district court's determination that subject matter jurisdiction exists over the present action is affirmed. All other aspects of this interlocutory appeal are dismissed for want of appellate jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Denice H. REIN, individually and as Executrix of the Estate of Mark Alan Rein, deceased, *et al.*, *Plaintiffs*,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, the Libyan External Security Organization, a/k/a Jamahiriya Security Organization, a/k/a Jso, Libyan Arab Airlines, Lamen Khalifa Fhima, a/k/a A Al Amin Khalifa Fhima, a/k/a Mr. Lamin, and Abdel Basset Ali Al-Megrahi, a/k/a Abdel Baset Ali Mohmed, a/k/a Abdel Baset Ali Mohmed Al Megrahi, a/k/a Mr. Baset, *Defendants*.

John Thomas BACCIOCHI, individually and as Administrator of the Estate of Clare Louise Bacciochi, deceased, *et al.*, *Plaintiffs*,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*, *Defendants*.

Norma R. WAGNER, individually and as Executrix of the Estate of Raymond R. Wagner, deceased, *et al.*, *Plaintiffs*,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*, *Defendants*.

M. Victoria CUMMOCK, individually and as personal representative of the Estate of John Cummock, deceased, *et. al.*, *Plaintiffs*,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*, *Defendants*.

Paul S. HUDSON, as personal representative of the Estate of Melina K. Hudson, deceased, *Plaintiff*,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*, *Defendants*.

Jane DAVIS, as personal representative of the Estate of Shannon Davis, deceased, *et al.*, *Plaintiffs*,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*, *Defendants*.

Elizabeth PURTELL, individually and as representative of the Estate of Michael Stinnett, deceased, *Plaintiff*,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*, *Defendants*.

Loulie D. CANADY, individually and as Administratrix of the Estate of Valarie Canady, deceased, *Plaintiff*,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*, *Defendants*.

Brenda CANITZ, individually and as Representative of the Estate of Milutin Velimirovich, deceased, *et al.*, *Plaintiffs*,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*, *Defendants*.

Nos. 96-CV-2077(TCP), 96-CV-1975(TCP), 96-CV-5140(TCP), 96-CV-2993(TCP), 94-CV-5557(TCP), 97-CV-0445(TCP), 97-CV-2610(TCP), 97-CV-2849(TCP) and 97-CV-0537(TCP).

MEMORANDUM AND ORDER

PLATT, District Judge.

Two motions are presently before the Court: (1) defendants' Motion to dismiss for lack of subject-matter and personal jurisdiction and for failure to state claims upon which relief can be granted; and (2) plaintiffs' Motion for an order prohibiting defendants from directing mailings or other communications to plaintiffs or their families. After briefly reviewing the background relevant to considering both of these motions, we discuss the merits of each in turn.

BACKGROUND

In 1994, some of these plaintiffs (representatives and survivors of victims who died in the destruction and crash of Pan Am Flight 103 in Lockerbie, Scotland, in December 1988) brought an action in this Court against The Socialist People's Libyan Arab Jamahiriya, the Libyan External Security Organization, the Libyan Arab Airlines (hereinafter collectively referred to as "Libya"), and Messrs. Lamen Khalifa Fhima and Abdel Basset Ali Al-Megrahi (hereinafter the "individual defendants") on the ground that Libya and its agents were responsible for the plane's destruction and the

resulting loss of life. Plaintiffs sought to vest subject-matter jurisdiction in the Court under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). On motion by Libya, this Court dismissed the action for lack of subject-matter jurisdiction under the FSIA as enacted prior its amendment in 1996. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F.Supp. 306 (1995), *aff'd*, 101 F.3d 239 (2d Cir.1996), *cert. denied*, — U.S. —, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997).

After Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which inter alia, amended the FSIA, the present plaintiffs commenced a new action in this Court seeking essentially the same relief as was sought in the prior action.

I.

In its reply brief Libya[1] says that it "does not claim that it has a *constitutional* right to sovereign immunity." (Emphasis in original.) This, of course, is something of a change from what we understood to be one of its original claims.

In broad form, Libya's claim is stated to be that "it possesses certain rights under *international* law." (Emphasis in original.)

Libya starts from the premise that the plaintiffs and the United States have mistaken "which branch of the United States Government possesses authority to determine the subject matter jurisdiction of federal courts." This, of course, is a false premise.

---

[1] The individual defendants have not been served with the Complaints in these actions and have not entered appearances.

Subject matter jurisdiction is bestowed on the federal courts by our Constitution. Article III makes it abundantly clear that

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" [and] "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies between . . . a State, or the Citizens thereof, and foreign States, Citizens or Subjects".

U.S. Const. art. III, §§ 1, 2.

From its above-stated false premise, Libya claims that because Congress enacted a law of the United States, *i.e.*, the FSIA, which prescribed that the Court's "jurisdiction" is to be determined in accordance with designations made by the Secretary of State, the FSIA is unconstitutional. But, that is not what the FSIA provides. Rather, the FSIA says that in cases involving potential sovereign immunity defenses, the Courts of the United States should decide the same "in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. And, that

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case — . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking[,] . . . except that the court shall decline to hear a claim under this paragraph — (A) if the foreign state was not designated as a state sponsor of

> terrorism under section 6(j) of the Export Administration Act (50 U.S.C.App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371) at the time the act occurred . . . .

28 U.S.C. § 1605(a)(7).

Contrary to Libya's claim, this statute merely confirms the power (jurisdiction) of the Courts of the United States to hear and determine all the controversies between citizens of the United States and foreign States and provides that the Courts shall "decline" to hear claims against nations not designated as "terrorist" states but quite apparently leaves open, *i.e.*, in the discretion of the Court, the power to hear claims against those nations so designated.

This does not change, but instead is very much in accord with both the "traditional office" (defendant's words) of the State Department's "suggestion of immunity" when sovereign immunity is viewed as the Second Circuit has said it should be, namely, as a defense "after jurisdiction has been acquired" by the Courts (as it has been in the case at bar). This was explained by the Court of Appeals for the *Second Circuit in Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931, 87 S.Ct. 291, 17 L.Ed.2d 213 (1966), as follows:

> "[I]n an action against a sovereign just as in any other suit, jurisdiction must be acquired either by service of process, or by the defendant's appearance in court, or *in rem* by seizure and control of property. *Only after such jurisdiction is acquired*, does the sovereign immunity defense proper[l]y come into consideration. Instead of being a 'jurisdictional' matter in the same sense as acquiring jurisdiction over a person or property,

> *sovereign immunity presents a ground for relinquishing the jurisdiction previously acquired."*

Id. at 106, quoting brief of the United States as *amicus curiae* in the rehearing *en banc*. (Emphasis added.)

More recently, the Second Circuit Court of Appeals has restated this proposition in the predecessor to this case as follows:

> We have no doubt that Congress has the authority either to maintain sovereign immunity of foreign states as a defense to all violations of *jus cogens* if it prefers to do so or to remove such immunity if that is its preference, and we have no doubt that Congress may choose to remove the defense of sovereign immunity selectively for particular violations of *jus cogens*, as it has recently done in the 1996 amendment of the FSIA.

Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d at 242.

In other words, all that Congress has attempted to do is to state to the courts that they should not ignore a defense of sovereign immunity in the great majority of cases, but they may do so in their discretion in those cases in which the Executive Branch has designated the particular states to be terrorist nations. Whether the federal courts need follow the direction to decline in the great majority of such cases is not before this Court to consider at this time.

It is, of course, also a well-recognized proposition that the Executive Branch has virtual unlimited authority to determine which cases to prosecute both civilly and criminally on behalf of the United States.

Underlying all of the foregoing, are, of course, a number of basic propositions.

Under Article I, § 8 of the Constitution, Congress has the power "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Laws of Nations" (cl.10) and the power "To declare War" (cl.11). Under the law enforcement and treaty powers (Art. II, § 1, cl. 8 and § 2, cl. 2), the President is charged with the duty of enforcing the laws and conducting foreign relations. Hence, it clearly was not a violation of the power of Congress to delegate to the Executive Branch (consistent with its power to conduct foreign relations) the designation of those sovereign nations which may be accorded sovereign immunity by the courts.

Moreover, on the question of a foreign state's sovereign immunity, the Supreme Court has held "that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country . . . ." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The FSIA "recognizes the immunity of foreign states, 28 U.S.C. § 1604, subject to specified exceptions," one of which is contained in the above-quoted portions of paragraph (7) of § 1605(a). *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d at 242.

In other words, the Constitution establishes and the FSIA simply recognizes and prescribes "subject matter" jurisdiction of the federal courts and a basis for obtaining such jurisdiction over a foreign country in such courts in cases "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking . . . ." 28 U.S.C. § 1605(a)(7).

This should be dispositive of Libya's first revised claim.

II.

Libya argues that this Court does not have personal jurisdiction over it because the facts alleged by plaintiffs fail to demonstrate sufficient contacts with this forum. Under the FSIA, personal jurisdiction of a foreign state exists for claims for which the court has jurisdiction where service has been properly effected. 28 U.S.C. § 1330(b). Thus, subject-matter jurisdiction together with proper service of process gives the court personal jurisdiction. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir.1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982).

In enacting § 1605(a)(7) of the FSIA, Congress intended to reach extraterritorial conduct. Accordingly, the relevant inquiry with respect to the minimum contacts analysis is whether the effects of a foreign state's actions upon the United States are sufficient to provide "fair warning" such that the foreign state may be subject to the jurisdiction of the courts of the United States. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Here, Libya is charged not "with mere untargeted negligence," but rather, intentional, tortious actions that "were expressly aimed at" the *United States*. *Calder v. Jones*, 465 U.S. 783, 789, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). This case concerns the destruction of a United States flag aircraft, which was manufactured and owed by United States corporations, while en route to the United States on a regularly scheduled flight with 189 United States nationals on board. Arguably, the destruction of Flight 103 has had extensive impacts on the United States, not the least of which was that 189 United States

nationals were killed in an alleged terrorist attack designed to harm the interests of the United States, but also that the bombing posed significant security concerns for the United States and its aviation industry. It addition, plaintiffs assert, it has caused significant harm to United States businesses and the domestic economy through, for example, a decline in passenger travel and increases in operating, insurance and potential liability costs.

Any foreign state would know that the United States has substantial interests in protecting its flag carriers and its nationals from terrorist activities and should reasonably expect that if these interests were harmed, it would be subject to a variety of potential responses, including civil actions in United States courts.

III.

Next, Libya claims that the FSIA violates due process because Libya has been designated a "state sponsor of terrorism." This designation, however, establishes only that an exception to foreign sovereign immunity under the FSIA applies in this action. The designation in no way affects the merits of the underlying claims or the liability of foreign states against whom actions may be maintained. *See* H.Rep. 94-1487, at 12, *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620-21, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). Having determined that it has jurisdiction in this nonjury action, this Court would put the FSIA aside and determine the merits of the action as an entirely separate matter. Furthermore, the FSIA in no way alters the fact that plaintiffs have the burden of proving that Libya was responsible for the acts alleged.

IV.

In another change of position, Libya states that "we now believe that strict scrutiny" review is required of the Secretary of State's designation of Libya as a "state sponsor of terrorism." Libya argues that this designation "violates their *fundamental right to a fair trial* as guaranteed by the Due Process Clause" because it will preclude Libya from getting a fair trial. (Emphasis in original.) As discussed above, however, the Secretary's designation goes only to establishing jurisdiction in particular cases. Once the Court determines the question of jurisdiction, the FSIA and its provisions need be addressed no further, and the matter would proceed on the merits to the extent plaintiffs sustain their burden of proving the underlying conduct.

The Secretary's designation addresses only the issue of whether a foreign state receives immunity in the courts of the United States—a matter of grace and comity accorded to a foreign state by Congress and the Executive in their exclusive and discretionary exercise of their foreign affairs powers under the Constitution. Because no fundamental right is implicated by the classification, the appropriate test is whether the statute is rationally related to a legitimate governmental purpose. *See, e.g., Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). If the "statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984).

The 1996 amendment to the FSIA is a reasonable means of achieving the legitimate government purpose of protecting United States nationals and air carriers in

international travel to and from the United States. The amendment is also a rational method of providing a forum for the victims of the enumerated acts to seek compensation for their injuries.

V.

Libya's claim that the 1996 FSIA amendment is an impermissible ex post facto law has no merit. That doctrine is inapplicable here. The constitutional *ex post facto* doctrine protects individuals from arbitrary penal sanctions that work unfairly to deprive them of a liberty interest. *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir.1997), *cert. denied*, — U.S.—, 118 S.Ct. 1066, 140 L.Ed.2d 126 (1998). It is not applicable to the question of whether a foreign state may be completely immune from liability in civil tort actions. Furthermore, a foreign state is not criminally punished or subjected to penal sanctions merely because the United States chooses not to bestow sovereign immunity upon the foreign state in a civil action in a United States court. The 1996 FSIA amendment establishes only whether a foreign state is amenable to civil suit in the courts of the United States.

Whether the fact that punitive damages are permitted by the FSIA may operate as a penal sanction is an issue that the Court need not address at this juncture.

VI.

Defendant Libya also moves to dismiss the Rein and Cummock plaintiffs' claims under the Torture Victims Protection Act ("TVPA"). Those claims, however, are directed only against the individual defendants, Al-Megrahi and Fhimah, parties not represented by defense counsel here. Similarly, the Cummock plaintiffs' allegations of violations of the Antiterrorism Act are directed only against

the individual defendants. Accordingly, defendants represented here have no standing to challenge these claims under the TVPA or the Antiterrorism Act.

VII.

Having established subject-matter and personal jurisdiction over defendants in this action, this Court also finds that it has pendent jurisdiction to hear all of the plaintiffs' remaining claims, including those by United States nationals for battery, intentional infliction of emotional distress and the claim by the Cummock plaintiffs of Libya's liability under the guaranty it made to the United Nations. *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 582-83 (2d Cir.1993).

VIII.

We turn now to plaintiffs' motion for an order prohibiting defendants from directing mailings or other communications to individual plaintiffs or their families. While plaintiffs correctly point out that it is within this Court's "inherent power to prohibit direct communications from one party to another under appropriate circumstances," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), we believe that the circumstances here do not give rise to such a situation.

The mailings about which plaintiffs complain clearly are not "entirely innocuous" or "purely informational" correspondence as characterized by defendants. The Court acknowledges that the mailings by Libya to plaintiffs are undesirable and cause plaintiffs some distress. The Court also acknowledges that Libya, as a litigant, has an obligation to refrain from sending any unwanted communications to its adversaries—particularly those which

may touch upon the merits of the actions between them—and that Libya's attorneys have an obligation to advise them that they not do so. Yet, we do not believe that Libya's actions to date in sending communications by mail to plaintiffs, standing alone, warrant the Court's exercise of its inherent power to supervise the conduct of parties appearing before the Court. The Court, however, strongly cautions the parties that they may not engage in conduct which interferes with its proceedings.

The Court shall continue to monitor the conduct of the parties in this litigation and will promptly hear any motions by plaintiffs in this regard and/or issue an order *sua sponte*, if necessary, to ensure that these proceedings are conducted in a proper and orderly fashion.

CONCLUSION

For the reasons set forth above, the Court hereby finds that the Motions by defendants to dismiss for lack of subject-matter and personal jurisdiction and for failure to state claims upon which relief can be granted must be, and the same hereby are, denied. Similarly, the Court hereby finds that the Motion by plaintiffs for an order prohibiting defendants from directing unwanted mailings and other communications to plaintiffs or their families must be, and the same hereby is, denied.

The Court has carefully reviewed and considered all of the parties' remaining arguments and finds that they are without merit.

SO ORDERED.

/s/ Thomas C. Platt
District Judge, U.S.D.C.

Dated: Uniondale, New York
February 26, 1998

Supreme Court, U.S.
FILED
APR 8 1999
OFFICE OF THE CLERK

No. 98-1449

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*,

Petitioners,

v.

DENICE H. REIN, *et al.*,

Respondents,

-and-

UNITED STATES OF AMERICA,

Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LEE S. KREINDLER, Chairman
Counsel of Record
STEVEN R. POUNIAN
JAMES P. KREINDLER
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

On the Brief:
JAMES P. KREINDLER
DAVID L. FIOL

Attorneys for Respondents
(additional counsel listed on inside cover)

152332

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

FRANK H. GRANITO, JR.
FRANK H. GRANITO, III
SPEISER, KRAUSE, MADOLE,
NOLAN & GRANITO
140 East 45th Street, 34th Floor
New York, New York 10017
(212) 661-0011

MICHEL F. BAUMEISTER
BAUMEISTER & SAMUELS
One Exchange Plaza
New York, New York 10006
(212) 363-1346

JEROME L. SKINNER
WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., LPA
1513 Central Trust Tower
Cincinnati, Ohio 45202
(513) 621-0267

READ K. McCAFFREY
PATTON BOGGS, LLP
2550 M Street, N.W.
Washington, DC 20037-1350
(202) 457-6315

DOUGLAS E. ROSENTHAL
SONNENSCHEIN, NATH
1301 K Street, N.W.
East Tower, Suite 600
Washington, DC 20005
(202) 408-6400

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Constitutional Provisions and Statutes Involved ...	1
Statement of the Case	3
Reasons for Denying the Writ	4
I. No Writ Should Be Granted On The Basis Of Petitioners' Separation Of Powers Argument Because The Decision Below Was Correct, Both On The Standing Grounds Explicitly Relied Upon By The Court Of Appeals, And On The Merits.	4
A. The Court of Appeals Properly Held that Petitioners Lack Standing to Challenge the Constitutionality of the 1996 Amendments.	5
B. In Making Sovereign Immunity Determinations, The Executive Exercises its Own Power Over Foreign Relations, Not a Power Delegated by Congress.	7
C. There Was No Delegation of Congressional Powers in the 1996 FSIA Amendments	15

Contents

Page

D. Cooperation Between the Executive and Legislative Branches Reflected in the 1996 Amendments Is Not Tantamount to Improper Delegation 16

II No Writ Should Be Granted To Review The Court Of Appeals' Refusal To Address Personal Jurisdiction, Because The Decision Was Correct And Petitioners' Substantive Argument Is Meritless. 18

III. No Writ Should Be Granted To Review The Court Of Appeals' Refusal To Address The Question Of Pendent Party Jurisdiction Over Alien Tort Claims Act Claims, As The Issue Was Not Reviewable Under The Collateral Order Doctrine. 21

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

Cases:

Bowsher v. Snyar, 478 U.S. 714 (1986) 6

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 7

Calder v. Jones, 465 U.S. 783 (1984) 19

Clements v. Fashing, 457 U.S. 957 (1982) 6, 7

County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979) 6

Dames & Moore v. Regan, 453 U.S. 654 (1981) ... 13, 14

First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) 8

Good v. Ohio Edison Co., 104 F.3d 93 (6th Cir. 1997) 20

In re: Flor, 79 F.3d 281 (2d Cir. 1995) 20

Jones v. United States, 137 U.S. 202 (1890) 14

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 16

Keene Corp. v. United States, 508 U.S. 200 (1993) 16

Cited Authorities

	Page
Loving v. United States, 517 U.S. 748 (1996)	16
Mesa v. California, 489 U.S. 121 (1989)	12
Mistretta v. United States, 488 U.S. 361 (1989)	16
Mizuna, Ltd. v. Crossland Federal Savings Bank, 90 F.3d 650 (2d Cir. 1996)	12
National City Bank of New York v. Republic of China, 348 U.S. 356 (1955)	8
Oetjen v. Central Leather Co., 246 U.S. 297 (1918)	8
Pfizer, Inc. v. India, 434 U.S. 308 (1978)	14
Raines v. Byrd, 521 U.S. 811, 117 S. Ct. 2312 (1997)	6
Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992)	19
Swint v. Chambers County Com'n, 514 U.S. 35 (1995)	18, 21
United States v. Brumage, 377 F. Supp. 144 (E.D.N.Y. 1974)	18
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)	9

Cited Authorities

	Page
United States v. Gurrola-Garcia, 547 F.2d 1075 (9th Cir. 1976)	18
United States v. Hays, 515 U.S. 737 (1995)	6
United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950)	15, 16
United States v. Streets, Alleys and Public Ways, 531 F.2d 882 (8th Cir. 1976)	20
Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)	7, 8, 10, 12
World-wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	19
Yakus v. United States, 321 U.S. 414 (1944)	17
Statutes:	
22 U.S.C. § 2371	1, 18
28 U.S.C. § 1292(b)	4, 20, 21
28 U.S.C. § 1330	12
28 U.S.C. §§ 1605-1607	12, 17
49 U.S.C. § 46501(2)	19

Cited Authorities

	Page
50 U.S.C. §§ 1701-1706	13
50 App. U.S.C. § 2405	5, 17
United States Constitution:	
Article I	10
Article II, Section 2	1, 8
Article II, Section 3	1, 8
Article III	6, 10
Article III, Section 2	1, 7, 10
Fifth Amendment	19
Rules:	
Fed. R. Civ. Proc. Rule 54(b)	20
United States Supreme Court Rule 10	18
Other Authorities:	
47 FR 11247 (March 16, 1982)	5
143 Cong. Rec. E1599-02, 1600 (Extended Remarks of Rep. J. Fox, July 31, 1997)	6

Cited Authorities

	Page
Antitterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 (Apr. 24, 1996), 110 Stat. 1214 ..	5
Iran and Libya Sanctions Act of 1996, Pub. L. 104-172 (Aug. 5, 1996), 110 Stat. 1541, § 3	5
Pub. L. 101-222, 103 Stat 1892 (December 12, 1989)	5
Pub. L. 104-132 (Apr. 24, 1996), § 324	5

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution, Article II, Section 2, second paragraph, states as follows:

> [The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls. . . .

2. The Constitution, Article II, Section 3, first paragraph, states in pertinent part as follows:

> [The President] shall receive ambassadors and other public ministers. . . .

3. The Constitution, Article III, Section 2, states:

> The judicial power shall extend . . . to Controversies between . . . a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

4. 22 U.S.C. § 2371 provides in part:

> Prohibition on assistance to governments supporting international terrorism
>
> (a) Prohibition. The United States shall not provide any assistance under this chapter, the Agricultural Trade Development and Assistance

Act of 1954 (7 U.S.C. 1691 et seq.), the Peace Corps Act (22 U.S.C. 2501 et seq.), or the Export-Import Bank Act of 1945 (12 U.S.C. 635 et seq.) to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism.

(b) Publication of determinations. Each determination of the Secretary of State under subsection (a) of this section, including each determination in effect on December 12, 1989, shall be published in the Federal Register.

(c) Rescission. A determination made by the Secretary of State under subsection (a) of this section may not be rescinded unless the President submits to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate —

(1) before the proposed rescission would take effect, a report certifying that —

(A) there has been a fundamental change in the leadership and policies of the government of the country concerned;

(B) that government is not supporting acts of international terrorism; and

(C) that government has provided assurances that it will not support acts of international terrorism in the future; or

(2) at least 45 days before the proposed rescission would take effect, a report justifying the rescission and certifying that —

(A) the government concerned has not provided any support for international terrorism during the preceding 6-month period; and

(B) the government concerned has provided assurances that it will not support acts of international terrorism in the future.

STATEMENT OF THE CASE

Petitioners' statement of the case is accurate but incomplete. Because Petitioners ask this Court to order immediate consideration by the Court of Appeals of the fact-dependent issue of personal jurisdiction, all information relevant to that issue should be provided.

Respondents filed with the District Court an attorney's affidavit specifically addressed to the issue, identifying evidence that the Flight 103 aircraft was registered in the United States, owned and operated by a United States corporation flying a United States flag, flown subject to a myriad of United States laws and regulations including

security regulations, bound directly for the United States and occupied by almost two hundred United States citizens. (J.A. at A-39, 51-57, 77-82). Additional evidence indicates the Petitioners selected Flight 103 for destruction specifically because of the foregoing facts, intending to cause harm to United States citizens and interests. (J.A. at A-39, 46, 51-57, 77-82).

Petitioners premised appellate jurisdiction solely on the collateral order doctrine, and made no written or oral motion for the District Court to certify any issue for immediate appeal under 28 U.S.C. § 1292(b). Petitioners were put on notice that their appeal might be severely circumscribed by jurisdictional problems when, on October 19, 1998, the Court of Appeals requested the parties to submit supplemental briefs on the issue of appellate jurisdiction over all issues other than subject matter jurisdiction.

REASONS FOR DENYING THE WRIT

I.

NO WRIT SHOULD BE GRANTED ON THE BASIS OF PETITIONERS' SEPARATION OF POWERS ARGUMENT BECAUSE THE DECISION BELOW WAS CORRECT, BOTH ON THE STANDING GROUNDS EXPLICITLY RELIED UPON BY THE COURT OF APPEALS, AND ON THE MERITS.

Petitioners advance a substantial number of misdirected political arguments which have no place before this Court, such as Petitioners' complaint that suits against foreign states authorized by the 1996 Amendments to the Foreign Sovereign Immunities Act ("FSIA") "are destructive of the U.S.

Government's efforts to ease strained relations between the United States and those states." Pet. at 16. We will only address Petitioners' legal claims, not their foreign policy positions.

A. The Court of Appeals Properly Held that Petitioners Lack Standing to Challenge the Constitutionality of the 1996 Amendments.

When it passed the 1996 amendments to the FSIA, Congress was well aware of the Executive Branch's finding that Libya was a terrorist state. *See* Antitterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 (Apr. 24, 1996), 110 Stat. 1214, 1255 (finding "the President should continue to undertake efforts to increase the international isolation of state sponsors of international terrorism . . . and should oppose any future initiatives to ease sanctions on Libya or other state sponsors of terrorism."). *See also* Iran and Libya Sanctions Act of 1996, Pub. L. 104-172 (Aug. 5, 1996), 110 Stat. 1541, § 3 ("The failure of the Government of Libya to comply with Resolutions . . . of the Security Council of the United Nations, its support of international terrorism, and its efforts to acquire weapons of mass destruction constitute a threat to international peace and security. . . ."); Pub. L. 104-132 (Apr. 24, 1996), § 324.[1] Indeed, Congress' intent in

1. Petitioners complain that their search of the Federal Register revealed no published determination that Libya was a terrorist state, as is required by 50 U.S.C. App. 2405(j)(3). Pet. at 7 n. 4. Petitioners' search was fruitless because the publishing requirement was not in the original statute; it was added by Pub. L. 101-222, 103 Stat 1892 (December 12, 1989), well after Libya was named as a terrorist state. *See* 47 FR 11247 (March 16, 1982) ("Pursuant to the authority granted by section 6 of the Export Administration Act of 1979, the President

(Cont'd)

passing the 1996 FSIA Amendments, at least in part, was to subject Libya and its agents to civil liability for the Pan Am 103 bombing. 143 Cong. Rec. E1599-02, 1600 (Extended Remarks of Rep. J. Fox, July 31, 1997). Given these facts, the Court of Appeals correctly held that Petitioners could not object to Congress' actions.

The Court of Appeals' holding was a straightforward application of Article III standing doctrine. Standing must exist in every case, including challenges to Congressional delegations of power; indeed the requirement is more strictly applied when statutes are challenged on Constitutional grounds. *See Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312, 2317-18 (1997); *Bowsher v. Snyar*, 478 U.S. 714, 721 (1986). One of the fundamental requirements for standing is that "there must be a causal connection between the injury and the conduct complained of." *United States v. Hays*, 515 U.S. 737, 743 (1995).

> A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

County Court of Ulster County, New York v. Allen, 442 U.S. 140, 155 (1979). *See also Clements v. Fashing*, 457 U.S. 957,

---

(Cont'd)
has determined that foreign policy controls affecting exports to Libya should be expanded. . . . Existing controls . . . continue in effect, as do existing controls for anti-terrorism purposes.").

965 n.3 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

Here, there is no "causal connection" between the exercise of jurisdiction over Petitioners, and the delegation of legislative authority that Petitioners complain of. Congress had already gone on record finding Libya to be a terrorist state.

Even if Petitioners had standing to advance an argument on the merits, they could not prevail, as the delegation of power by Congress that they object to was not a delegation at all.

B. In Making Sovereign Immunity Determinations, The Executive Exercises its Own Power Over Foreign Relations, Not a Power Delegated by Congress.

Petitioners' arguments come without even a pretense of reliance upon the text of the Constitution, or this Court's many decisions touching upon the power of the Executive in the area of foreign sovereign immunity. We believe a thoughtful examination of history and this Court's precedent dictates a finding that the 1996 Amendments to the FSIA are Constitutional.

Immunity from suit is conferred upon foreign nations as a matter of grace and comity, and is not a Constitutional right. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983). The Constitution does not even allude to the concept of foreign sovereign immunity; indeed Article III, Section 2 states that the jurisdiction of federal courts "shall extend . . . to Controversies between . . . a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Until the FSIA was passed, foreign sovereign immunity did not even have a statutory basis; determinations were almost exclusively within the province of the Executive, which made "suggestions of immunity" to which the judiciary "consistently . . . deferred." *Verlinden*, 461 U.S. at 486. *See also National City Bank of New York v. Republic of China,* 348 U.S. 356, 360 (1955) (State Department suggestions of immunity were accorded "significant weight" by courts).

The traditional "suggestions of immunity" were a natural facet of the Executive's Constitutionally delegated powers. The Constitution assigns the task of conducting foreign relations to the Executive and Legislative branches. *See* U.S. Constitution, Art. II, Sections 2-3; *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (*quoting Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative — 'the political' — departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.") Between the two branches, the President takes front seat in foreign affairs:

> As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. . . .
>
> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations-a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936).

Because this Court has been so careful to preserve and protect the Executive's powers in this field, the Executive's "suggestions of immunity" were never seriously questioned.

While the FSIA codified the rules of sovereign immunity and charged the federal courts with the task of applying those rules to each case, that statute could not and did not work a

change in the Constitutional allocation of powers among the branches.

Placed in this context, Petitioners' contention that the 1996 Amendments improperly delegated a legislative function to the Executive is untenable. If the Executive could make all determinations regarding immunity prior to 1976, surely Congress could restore to the Executive a small fraction of that power.

Petitioners' argument to the contrary arises in part from a misreading of *Verlinden*. According to Petitioners, *Verlinden* stands for the proposition that "sovereign immunity under the FSIA is a jurisdictional issue, not an affirmative defense. . . ." Pet. at 15. This equation of sovereign immunity with the jurisdiction of the federal courts is the linchpin of Petitioners' claim that Congress improperly delegated to the Executive the function of establishing the jurisdiction of the federal courts. However, Petitioners misread *Verlinden*.

Verlinden was an action between two foreign states. Article III, Section 2 of the Constitution does not grant federal courts jurisdiction over such cases *per se*; jurisdiction could only be supplied by the "arising under" clause. Discussing the holding of the Court of Appeals below, this Court noted that Article III "arising under" jurisdiction cannot be invoked by a statute that simply declared that federal courts could assert jurisdiction over a certain class of cases; rather, Article III "arising under" jurisdiction exists only over claims involving some substantive rule of federal law, enacted by Congress pursuant to the powers enumerated in Article I. 461 U.S. at 495-96. This Court concluded that the rules regarding sovereign immunity codified in the FSIA were not simply jurisdictional, but embodied substantive federal law, and could form the basis for "arising under" jurisdiction.

> [I]n enacting the Foreign Sovereign Immunities Act, Congress expressly exercised its power to regulate foreign commerce, along with other specified Article I powers. See n. 19, supra. As the House Report clearly indicates, the primary purpose of the Act was to "se[t] forth comprehensive rules governing sovereign immunity," H.R. Rep. No. 94-1487, at p. 12; the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. *The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law;* and applying those standards will generally require interpretation of numerous points of federal law. Finally, if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States —manifestly, "the title or right set up by the party, may be defeated by one construction of the . . . laws of the United States, and sustained by the opposite construction." *That the inquiry into foreign sovereign immunity is labeled under the Act as a matter of jurisdiction does not affect the constitutionality of Congress' action in granting federal courts jurisdiction over cases calling for application of this comprehensive regulatory statute.*

461 U.S. at 496-97 (citations omitted, emphasis added).

In *Mesa v. California*, 489 U.S. 121 (1989), this Court left no doubt about what it held in *Verlinden*:

> In Verlinden we held that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, is a "comprehensive scheme" comprising both pure jurisdictional provisions and federal law capable of supporting Art. III "arising under" jurisdiction. 461 U.S., at 496.

489 U.S. at 136. *See also Mizuna, Ltd. v. Crossland Federal Savings Bank,* 90 F.3d 650, 656 (2d Cir. 1996) (this Court "emphasized that the Foreign Sovereign Immunities Act did more than merely recite a grant of access to the district court; it expressly invoked the powers of Congress to regulate foreign commerce, along with other Congressional powers, and constituted a comprehensive scheme for the conferring or withholding of foreign sovereign immunity.")[2].

That sovereign immunity remains a substantive element of federal law is demonstrated by the fact that while state courts retain jurisdiction over actions against foreign sovereigns, the FSIA codifies the affirmative defense of immunity in those courts as well. *Verlinden*, 461 U.S. at 489. Congress has no power to define the jurisdiction of the state

---

2. The structure of the FSIA itself supports this conclusion. The substantive provisions regulating the immunity of foreign states are found at 28 U.S.C. § 1605, *et seq*. The jurisdictional grant is separately located within the jurisdictional provisions of the same title, at 28 U.S.C. § 1330, and it states that the District Courts will have subject matter jurisdiction over any claims where "the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." Congress obviously did not view sovereign immunity as purely a jurisdictional matter.

courts, and can only enact a substantive defense that applies to actions in state courts.

The distinction between substantive law governing claims against foreign states and the rules governing the jurisdiction of the federal courts was applied by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The plaintiff had obtained a U.S. judgment for breach of contract against Iran, but pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, the President froze all Iranian assets in the U.S. He later negotiated the release of hostages held in Iran, in part by agreeing to release the assets. This precluded the plaintiff from enforcing its U.S. judgment. Nevertheless, this Court rejected the assertion that the jurisdiction of the federal courts was improperly circumscribed by Executive action:

> Petitioner . . . asserts that Congress divested the President of the authority to settle claims when it enacted the Foreign Sovereign Immunities Act of 1976 (hereinafter FSIA), 28 U.S.C. §§ 1330, 1602 et seq. The FSIA granted personal and subject-matter jurisdiction in the federal District Courts over commercial suits brought by claimants against those foreign states which have waived immunity. 28 U.S.C. § 1330. . . . Petitioner thus insists that the President, by suspending its claims, has circumscribed the jurisdiction of the United States courts in violation of Art. III of the Constitution.
>
> We disagree. . . . The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change

> in the substantive law governing the lawsuit. Indeed, the very example of sovereign immunity belies petitioner's argument. No one would suggest that a determination of sovereign immunity divests the federal courts of "jurisdiction." Yet, petitioner's argument, if accepted, would have required courts prior to the enactment of the FSIA to reject as an encroachment on their jurisdiction the President's determination of a foreign state's sovereign immunity.

453 U.S. at 684-85. *See also Pfizer, Inc. v. India*, 434 U.S. 308, 319-20 (1978) ("only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue."); *Jones v. United States,* 137 U.S. 202 (1890) (Statute granting the federal courts jurisdiction over crimes committed on islands that the State Department found to be "appertaining" to the United States was constitutional, and the U.S. District Court had jurisdiction to try a defendant for a murder committed on such an island).

Viewed from a Constitutional perspective, the jurisdiction of the federal courts and the sovereign immunity of foreign states are not the same thing. Control of the former is allocated to Congress; power over the latter is shared by the Executive and Legislative. Congress' decision to make the jurisdiction of the federal courts a function of sovereign immunity cannot deprive the Executive of its Constitutional power to make foreign policy decisions, including decisions that have sovereign immunity implications. In making sovereign immunity determinations, the Executive exercises its own powers, not those of Congress.

C. There Was No Delegation of Congressional Powers in the 1996 FSIA Amendments

Because the Executive has the Constitutional power to make foreign sovereign immunity determinations, Congress has no need to delegate that power to it. Thus, the Petitioners' delegation of powers argument must fail, because there was no delegation.

A situation much like this one was presented in *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). There, an alien challenged her exclusion from the United States by officials of the State Department, who were acting under both statutory authority and State Department regulations. This Court found that she had no viable argument that Congress had improperly delegated functions to the Executive:

> Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

338 U.S. at 542 (citations omitted).

Here, as in *Knauff*, the right to identify foreign states who engage in terrorist activity, and deprive them of sovereign immunity, "is inherent in the executive power to control the foreign affairs of the nation." The fact that Congress has chosen to attach some jurisdictional import to that factual determination by the Executive does not thereby render that determination a legislative function.

D. Cooperation Between the Executive and Legislative Branches Reflected in the 1996 Amendments Is Not Tantamount to Improper Delegation

Even if the 1996 Amendments were viewed as a delegation, they withstand any Constitutional scrutiny. While the power to determine the jurisdiction of the lower federal courts rests in the hands of Congress, e.g. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993), there is no basis for Petitioners' claim that Congress may not rely upon the Executive branch's exercise of its foreign policy functions.

> We . . . have recognized . . . that the separation-of-powers principle, and the non-delegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.

Mistretta v. United States, 488 U.S. 361, 372 (1989) (*quoting J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). *See also Loving v. United States*, 517 U.S. 748 (1996) (the "Framers' choice . . . was to give Congress the same flexibility to exercise or share power as times might demand.") The narrow, factual determination required of the Executive in this case is entirely appropriate:

> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.

Yakus v. United States, 321 U.S. 414, 424 (1944).

In 28 U.S.C. § 1605(a)(7), Congress alone resolved to deny sovereign immunity in cases involving injuries resulting from "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." Congress alone determined that the exception to immunity would be further limited by applying it only to countries who engaged in or supported repeated acts of terrorism. The only function left to the Executive is one to which it alone is suited: evaluating the flow of information gathered by diplomatic and intelligence officials to make the factual determination required by Congress' broad policy directive.

Notably, the lists referred to by the FSIA have been maintained by the Executive in one form or another for decades. The first list, compiled under 50 App. U.S.C. § 2405, regulates export by U.S. manufacturers of military and

strategic goods and has been law in various forms since the 1940s. *See United States v. Brumage*, 377 F. Supp. 144, 146 (E.D.N.Y. 1974). The second list is compiled by authority of 22 U.S.C. § 2371, which was enacted 20 years ago and prohibits foreign assistance to terrorist states. No Court has questioned the constitutionality of either statute. *See United States v. Gurrola-Garcia*, 547 F.2d 1075, 1078-79 (9th Cir. 1976).

II.

NO WRIT SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' REFUSAL TO ADDRESS PERSONAL JURISDICTION, BECAUSE THE DECISION WAS CORRECT AND PETITIONERS' SUBSTANTIVE ARGUMENT IS MERITLESS.

While respondents were anxious to have the Court of Appeals reject petitioners' personal jurisdiction claims, that court has written a thoughtful opinion which applies the guidance recently proved by this Court in *Swint v. Chambers County Com'n*, 514 U.S. 35 (1995). We see no basis for this Court to grant a writ.[3]

Moreover, we do not believe that the Petitioners suffered any disadvantage as a result of the Court of Appeals' refusal to address the personal jurisdiction issue, because their argument on the merits is not the least bit compelling. The

---

3. While it does appear that the decision below might conflict with the position taken by panels of the D.C. Circuit, it is far too early to preclude the possibility that the two Circuit Courts will resolve the conflicts themselves. Moreover, it can hardly be said that this issue is "important" under Rule 10 of the Rules of this Court, since it arises so rarely.

minimum contacts required by the Due Process Clause of the Fifth Amendment exist when a sovereign state and its agents target United States citizens for death with the specific intent of injuring the United States and its interests. This conduct alone is enough for a United States court to exercise personal jurisdiction over defendants, even if they never set foot in the United States. *Calder v. Jones*, 465 U.S. 783, 788-90 (1984); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992).

The contacts with the United States actually go much further than an attack on its citizens from afar: respondents filed an affidavit with the District Court outlining evidence that the Petitioners set out to accomplish their goals by bombing an aircraft that was owned and operated by a United States airline, and which would have next landed at Kennedy Airport in New York, had the bomb not destroyed the aircraft. It could not offend "traditional notions of fair play" for a United States court to exercise jurisdiction under these circumstances. *Compare* 49 U.S.C. § 46501(2) (establishing "special aircraft jurisdiction of the United States," which covers, inter alia, "a civil aircraft of the United States," and crimes committed on *any* aircraft which is destined to and does land in the United States).

Below, Petitioners did advance one novel argument — that they could not have anticipated being haled into court in the United States because under United States law at the time, they were completely immune from suit for the acts in which they engaged. This argument seeks to invoke this Court's holding that the "defendant's conduct and connection with the forum State must be such that [it] should reasonably anticipate being haled into court there." *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The argument was properly rejected.

The argument misconstrues the core basis of a personal jurisdiction analysis. In considering whether a defendant could reasonably expect to be subject to suit in a particular jurisdiction, no court has ever accepted the proposition that a defendant could point to the substantive law of that jurisdiction, and argue that it expected legal immunity. The argument attempts to fold an ex post facto clause consideration into personal jurisdiction analysis, even though the ex post facto clause has no application to a claim for civil damages.

Denial of the Petition here is especially warranted given the route by which Petitioners' personal jurisdiction claims have reached this court. No court has faced the particular personal jurisdiction questions raised here. On that basis, Petitioners could have sought certification under 28 U.S.C. § 1292(b). Such a motion could have been entertained and granted by the District Court, even after the interlocutory appeal had been filed. *See In re: Flor*, 79 F.3d 281, 284 (2d Cir. 1995); *United States v. Streets, Alleys and Public Ways*, 531 F.2d 882, 884 n.1 (8th Cir. 1976); *Compare Good v. Ohio Edison Co.*, 104 F.3d 93 (6th Cir. 1997) (Fed. R. Civ. Proc. Rule 54(b) certification obtained after the filing of a notice of appeal can validate an appeal over which the Court of Appeals would otherwise lack jurisdiction).

Petitioners were placed on notice that the Court of Appeals might be unable to consider the personal jurisdiction issue on the basis of the collateral order doctrine, when that court issued its order requesting supplemental briefs. Petitioners chose to remain inert. The decision below will not preclude future litigants from seeking appropriate interlocutory review under 28 U.S.C. § 1292(b), in conjunction with an appeal based on the collateral order doctrine.

III.

NO WRIT SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' REFUSAL TO ADDRESS THE QUESTION OF PENDENT PARTY JURISDICTION OVER ALIEN TORT CLAIMS ACT CLAIMS, AS THE ISSUE WAS NOT REVIEWABLE UNDER THE COLLATERAL ORDER DOCTRINE.

Having correctly decided that Petitioners enjoy no immunity from suit by United States nationals and their survivors under the FSIA, the Court of Appeals properly refused to exercise appellate jurisdiction over the Alien Tort Claims Act issue under the collateral order doctrine. Decisions reviewable under the collateral order doctrine are those that are "conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers County Com'n*, 514 U.S. 35, 42 (1995). The last requirement of that test is not satisfied here.

Because Petitioners enjoy no immunity from suits brought by U.S. nationals, they must defend those actions on the merits. They will bear no greater burden by defending claims by foreign nationals that arise out of the very same facts. Therefore, whether Petitioners are found to be immune from suit under the Alien Tort Claims Act now, or later, is of no moment. Petitioners' immunity from suit by the Alien plaintiffs is an issue that is "effectively reviewable" after trial and judgment by the District Court.

Moreover, perhaps even more than the personal jurisdiction issue, this issue was amenable to certification by the District Court under 28 U.S.C. § 1292(b). Petitioners chose to forego that avenue for appeal, and should not be heard to complain now.

CONCLUSION

For the reasons provided above, the petition should be denied.

Respectfully submitted,

LEE S. KREINDLER, Chairman
Counsel of Record
STEVEN R. POUNIAN
JAMES P. KREINDLER
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

FRANK H. GRANITO, JR.
FRANK H. GRANITO, III
SPEISER, KRAUSE, MADOLE,
NOLAN & GRANITO
140 East 45th Street, 34th Floor
New York, New York 10017
(212) 661-0011

MICHEL F. BAUMEISTER
BAUMEISTER & SAMUELS
One Exchange Plaza
New York, New York 10006
(212) 363-1346

JEROME L. SKINNER
WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., LPA
1513 Central Trust Tower
Cincinnati, Ohio 45202
(513) 621-0267

READ K. McCAFFREY
PATTON BOGGS, LLP
2550 M Street, N.W.
Washington, DC 20037-1350
(202) 457-6315

DOUGLAS E. ROSENTHAL
SONNENSCHEIN, NATH
1301 K Street, N.W.
East Tower, Suite 600
Washington, DC 20005
(202) 408-6400

Attorneys for Respondents

On the Brief:

JAMES P. KREINDLER
DAVID L. FIOL

Supreme Court, U.S.
FILED
MAY 12 1999
CLERK

(3)

No. 98-1449

In the Supreme Court of the United States

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, ET AL., PETITIONERS

v.

DENICE H. REIN, EXECUTRIX OF THE ESTATE OF MARK ALAN REIN, DECEASED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

DOUGLAS N. LETTER
FREDDI LIPSTEIN
CARL E. GOLDFARB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID R. ANDREWS
Legal Adviser

JONATHAN B. SCHWARTZ
Deputy Legal Adviser

LINDA JACOBSON
Assistant Legal Adviser

JACK CHOROWSKY
Special Assistant to the Legal Adviser
Department of State
Washington, D.C. 20520-6310

1998

QUESTION PRESENTED

The brief for the United States will address the following question:

Whether 28 U.S.C. 1605(a)(7) (Supp. III 1997), which provides that countries designated as state sponsors of terrorism shall not have sovereign immunity for acts such as aircraft sabotage, is constitutional as applied to this suit against Libya.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Abdulaziz v. *Metropolitan Dade County*, 741 F.2d 1328 (11th Cir. 1984)	13
Baiz, In re, 135 U.S. 403 (1890)	13
Baker v. *Carr*, 369 U.S. 186 (1962)	10
Dames & Moore v. *Regan*, 453 U.S. 654 (1981)	11
Guaranty Trust Co. v. *United States*, 304 U.S. 126 (1938)	13
Jones v. *United States*, 137 U.S. 202 (1890)	7, 11, 12
Kadic v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996)	13
Lafontant v. *Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994)	13
Matimak Trading Co. v. *Khalily*, 118 F.3d 76 (2d Cir. 1997), cert. denied, 522 U.S. 1091 (1998)	12-13
Metropolitan Wash. Airports Auth. v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991)	9
National City Bank v. *Republic of China*, 348 U.S. 356 (1955)	14
Pfizer Inc. v. *Government of India*, 434 U.S. 308 (1978)	13
Smith v. *Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995), aff'd, 101 F.3d 239 (2d Cir. 1996), cert. denied, 520 U.S. 1204 (1997)	4-5

Cases—Continued: Page

Swint v. *Chambers County Comm'n*, 514 U.S. 35 (1995) 7
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 11
United States v. *Pink*, 315 U.S. 203 (1942) 13
Verlinden B. V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 2, 14

Constitution, statutes and regulation:

U.S. Const.:
Art. III, § 2, Cl. 2 13
Amend. V (Due Process Clause) 10
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214:
§ 221(a), 110 Stat. 1241 (28 U.S.C. 1605 (Supp. III 1997)) 2
§ 221(c), 110 Stat. 1243 (28 U.S.C. 1605 note (Supp. III 1997)) 3
§ 324, 110 Stat. 1255 (22 U.S.C. 2377 note (Supp. III 1997)) 4
Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (50 U.S.C. App. 2401 *et seq.*):
§ 6, 93 Stat. 513 (50 U.S.C. App. 2405 (1994 & Supp. II 1996)) 3
§ 6(i), 93 Stat. 515 (50 U.S.C. App. 2405(j)) 3
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* 2
28 U.S.C. 1604 2
28 U.S.C. 1605(a) (1994 & Supp. III 1997) 10
28 U.S.C. 1605(a)(7) (Supp. III 1997) ..... *passim*
28 U.S.C. 1605(a)(7)(A) (Supp. III 1997) 8, 9
28 U.S.C. 1605(a)(7)(B)(ii) (Supp. III 1997) 3
Guano Islands Act of Aug. 18, 1856, Rev. Stat. §§ 5570-5578 (1878 ed.) 11
§ 5570 11
§ 5576 12
18 U.S.C. 7(4) 12

Statutes and regulation—Continued: Page

22 U.S.C. 2349aa-9 3
22 U.S.C. 2371 3
28 U.S.C. 1251(b)(1) 13
28 U.S.C. 1332(a)(2) 12
28 U.S.C. 1332(a)(4) 12
28 U.S.C. 2403(a) 6, 14
15 C.F.R. 385.4(d) (1981) 3

Miscellaneous:

142 Cong. Rec. (1996):
p. 4551 4
p. 4558 4
p. 4568 4
p. 7790 4
p. 7801 4
45 Fed. Reg. 1595-1599 (1980) 3

In the Supreme Court of the United States

No. 98-1449

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, ET AL., PETITIONERS

v.

DENICE H. REIN, EXECUTRIX OF THE ESTATE OF MARK ALAN REIN, DECEASED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 162 F.3d 748. The opinion of the district court (Pet. App. 37a-50a) is reported at 995 F. Supp. 325.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1998. The petition for a writ of certiorari was filed on March 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Sovereign immunity for foreign states in federal courts is a privilege that under the Constitution may be restricted by Congress and the Executive Branch as they choose. "[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, establishes as a general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of" Title 28. See 28 U.S.C. 1604. The instant case involves the application of 28 U.S.C. 1605(a)(7) (Supp. III 1997), which was added to the FSIA by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. Section 1605(a)(7) provides that a foreign state is not immune in any case

> * * * in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources * * * for such an act * * * engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—
>
> > (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50

> U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act[.]

28 U.S.C. 1605(a)(7) (Supp. III 1997). Section 1605(a)(7) divests the foreign state of immunity only if the claimant or the victim was a national of the United States when the act upon which the claim is based occurred. 28 U.S.C. 1605(a)(7)(B)(ii) (Supp. III 1997). Section 1605(a)(7) "appl[ies] to any cause of action arising before, on, or after the date of the enactment of" the AEDPA. AEDPA § 221(c), 110 Stat. 1243 (28 U.S.C. 1605 note (Supp. III 1997)).

2. For nearly 20 years, Libya has been designated by the Executive Branch as a state sponsor of terrorism pursuant to the Export Administration Act of 1979, Pub. L. No. 96-72, § 6(i), 93 Stat. 515 (currently codified as amended as Section 6(j) of the Export Administration Act, 50 U.S.C. App. 2405(j)). See 15 C.F.R. 385.4(d) (1981) (describing Libya, Iraq, People's Democratic Republic of Yemen, and Syria as "countries that have repeatedly provided support for acts of international terrorism," and explaining that exports to those countries are subject to restrictions imposed by, *inter alia*, Section 6(i) of the Export Administration Act); 45 Fed. Reg. 1595-1599 (1980).[1] The 1996 legislation that added Section 1605(a)(7) to the FSIA contained explicit

---

[1] The designation of Libya and other countries as state sponsors of terrorism under the Export Administration Act and other federal statutes has the effect, *inter alia*, of triggering restrictions on exports of arms and dual-use technology, as well as a variety of prohibitions on the provision of foreign assistance and trade benefits. See, *e.g.*, 50 U.S.C. App. 2405 (1994 & Supp. II 1996); 22 U.S.C. 2349aa-9, 2371.

congressional findings referring to the previous designation of Libya as a state sponsor of terrorism. See AEDPA § 324, 110 Stat. 1255 (finding, *inter alia*, that "the Congress deplores decisions to ease, evade, or end international sanctions on state sponsors of terrorism, including the recent decision by the United Nations Sanctions Committee to allow airline flights to and from Libya despite Libya's non-compliance with United Nations resolutions," and that "the President should continue to undertake efforts to increase the international isolation of state sponsors of international terrorism, including efforts to strengthen international sanctions, and should oppose any future initiatives to ease sanctions on Libya or other state sponsors of terrorism").[2]

3. On December 21, 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland, killing all 259 persons on board and 11 persons on the ground below. Pet. App. 10a. In the aftermath of the bombing, the families of some of the victims filed suit for damages against Libya, Libya's intelligence service, Libya's state-owned airline, and two Libyan citizens who were employees and agents of the Libyan government. That suit was dismissed for lack of subject-matter jurisdiction. *Smith*

---

[2] Indeed, the legislative history suggests that Section 1605(a)(7) was intended at least in part to subject Libya and its agencies and instrumentalities to civil liability for the bombing of Pan Am Flight 103 in December 1988—the terrorist act that is at issue in this case. See 142 Cong. Rec. 4551, 4558 (1996) (remarks of Rep. Ros-Lehtinen) (introducing letter supporting the legislation from Victoria Diaz Cummock, president of the Families of Pan Am 103/Lockerbie); *id.* at 4568 (remarks of Rep. Fox); *id.* at 7790 (remarks of Sen. Brown); *id.* at 7801 (remarks of Sen. Dole) (introducing letter supporting the legislation from Victoria Diaz Cummock, president of the Families of Pan Am 103/Lockerbie).

v. *Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995), aff'd, 101 F.3d 239 (2d Cir. 1996), cert. denied, 520 U.S. 1204 (1997). Both the district court and the court of appeals rejected the plaintiffs' argument that, under the pre-1996 version of the FSIA, Libya had waived its sovereign immunity by violating "fundamental international norms" ("*jus cogens*"). See *id.* at 313-315; 101 F.3d at 242-245.

The instant suit was filed after the enactment of Section 1605(a)(7) in 1996. The plaintiffs (respondents in this Court) are survivors and representatives of persons killed aboard Pan Am Flight 103. Pet. App. 9a. Libya, its intelligence service, and its national airline—the petitioners in this Court—were named as defendants. *Id.* at 8a-9a, 10a, 12a-13a, 39a-40a. Respondents alleged that petitioners were responsible for the destruction of Pam Am Flight 103. *Id.* at 39a-40a.

Petitioners moved to dismiss the suit for lack of subject-matter and personal jurisdiction, and for failure to state claims upon which relief can be granted. Pet. App. 39a. Petitioners contended, *inter alia*, that Section 1605(a)(7) empowers the Secretary of State to determine the jurisdiction of the federal courts and is therefore unconstitutional. See *id.* at 41a. The district court denied the motion to dismiss. *Id.* at 37a-50a. The court held that Section 1605(a)(7) is constitutional, *id.* at 40a-45a, 48a; that the court had personal jurisdiction over the petitioners, *id.* at 45a-46a; that the designation of Libya as a state sponsor of terrorism did not deny the petitioners due process of law with respect to the adjudication of the underlying claims, *id.* at 46a-48a; and that no portion of the action should be dismissed for failure to state a claim, *id.* at 48a-49a.

4. Petitioners filed an interlocutory appeal from the district court's decision denying the motion to dismiss.

The United States intervened in the case pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Section 1605(a)(7). The court of appeals affirmed the district court's determination that it possessed subject-matter jurisdiction over the suit, and it dismissed the remainder of the appeal for lack of appellate jurisdiction. Pet. App. 1a-36a.

a. The court of appeals held that as applied to Libya, Section 1605(a)(7) does not constitute an improper delegation of legislative authority. The court explained that

> [a]t the time that § 1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism. No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103. That jurisdiction existed the moment the AEDPA amendment became law.

Pet. App. 35a. Because Libya had been designated as a state sponsor of terrorism before the passage of the 1996 FSIA amendments, the court stated, "[t]he decision to subject Libya to jurisdiction under § 1605(a)(7) was manifestly made by Congress itself rather than by the State Department." *Ibid.* Since Section 1605(a)(7), as applied to Libya, "creates jurisdiction directly at the behest of Congress and without any intervening decision by another body," the court of appeals found "no delegation of legislative power and, necessarily, no unconstitutional delegation either." *Id.* at 36a.[3]

---

[3] The court of appeals observed that an "issue of delegation might be presented if another foreign sovereign—one not identified as a state sponsor of terrorism when § 1605(a)(7) was passed—was placed on the relevant list by the State Department and, on being sued in federal court, interposed the defense that

b. The court of appeals concluded that it lacked appellate jurisdiction to consider petitioners' other challenges to the district court's ruling. Pet. App. 14a-30a. The court explained that although "[t]he denial of Libya's motion to dismiss on the grounds of sovereign immunity is appealable as a collateral order," *id.* at 14a, the other claims raised in petitioners' appeal were not independently subject to interlocutory review, *id.* at 16a. The court construed this Court's decision in *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995), as generally directing the courts of appeals "not to take 'pendent appellate jurisdiction' on interlocutory appeals of issues not themselves immediately appealable." Pet. App. 16a. Under *Swint*, the court of appeals stated, the exercise of pendent appellate jurisdiction is appropriate only "(a) where an issue is 'inextricably intertwined' with a question that is the proper subject of an immediate appeal, or (b) where review of a jurisdictionally insufficient issue is 'necessary to ensure meaningful review' of a jurisdictionally sufficient one." *Id.* at 19a. The court of appeals concluded that none of petitioners' other claims satisfied those requirements, see *id.* at 22a-30a, and it accordingly dismissed the appeal with respect to those claims, *id.* at 36a.

ARGUMENT

The court of appeals correctly held that 28 U.S.C. 1605(a)(7) (Supp. III 1997) is constitutional as applied to

---

Libya now raises." Pet. App. 35a. The court declined to resolve the question whether Section 1605(a)(7) would be constitutional as applied to such a case. See *id.* at 35a-36a. The court noted, however, that this Court in *Jones* v. *United States*, 137 U.S. 202 (1890), "upheld the existence of federal court jurisdiction even though that jurisdiction depended on a factual determination that had been delegated to the Department of State." Pet. App. 33a.

this suit against Libya. That holding does not conflict with any decision of this Court or of another court of appeals, and it does not warrant further review.

1. Petitioner challenges Section 1605(a)(7) as an unconstitutional delegation of power to the Executive Branch to determine which foreign states constitute "state sponsors of terrorism" and are therefore subject to suit in the federal courts. See Pet. 13-17. The instant case does not present that question, however, because the decision to subject Libya to suit for the acts at issue in this case was as a historical matter made by Congress and not by the Executive Branch.

As the court of appeals correctly held, Section 1605(a)(7) as applied to this suit involves "no delegation of legislative power and, necessarily, no unconstitutional delegation either." Pet. App. 36a. Under Section 1605(a)(7), a foreign state's susceptibility to suit for acts such as aircraft sabotage generally turns on whether that state was "designated as a state sponsor of terrorism * * * at the time the act occurred." 28 U.S.C. 1605(a)(7)(A) (Supp. III 1997). Libya had been designated by the Executive Branch as a state sponsor of terrorism well before the bombing of Pan Am Flight 103, and before the enactment of Section 1605(a)(7). See p. 3, *supra*. Thus, when Congress enacted Section 1605(a)(7), it thereby divested Libya of sovereign immunity for the acts alleged in this case. See Pet. App. 35a ("No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103."); *id.* at 36a (Section 1605(a)(7) "creates jurisdiction directly at the behest of Congress and without any intervening decision by another body."). Moreover, the legislative history suggests that enactment of Section 1605(a)(7) was intended, at least in part, to divest Libya of sover-

eign immunity in suits concerning Pan Am Flight 103. See note 2, *supra*. The statute divested Libya of immunity for the acts at issue in this case by incorporating an action *previously* taken by the Executive Branch; because of this particular sequence of events, no subsequent exercise of delegated authority under Section 1605(a)(7) could either remove or restore Libya's immunity for those acts. Indeed, even if Executive Branch officials had removed Libya from the list of state sponsors of terrorism after AEDPA was enacted, Libya could not assert sovereign immunity in the instant suit, since a subsequent delisting would not alter the fact that the country was "designated as a state sponsor of terrorism * * * at the time the act occurred." 28 U.S.C. 1605(a)(7)(A) (Supp. III 1997).

As the court of appeals observed, an "issue of delegation might be presented if another foreign sovereign—one not identified as a state sponsor of terrorism when § 1605(a)(7) was passed—was placed on the relevant list by the State Department and, on being sued in federal court, interposed the defense that Libya now raises." Pet. App. 35a. As set forth below, Section 1605(a)(7) would be constitutional as applied in that setting as well. But regardless of the proper disposition of that hypothetical case, application of Section 1605(a)(7) to this suit raises no significant constitutional concern.[4]

---

[4] Petitioners also argue (Pet. 14) that Section 1605(a)(7) violates principles of separation of powers. Assuming that a foreign state may raise a separation-of-powers argument, but see, *e.g.*, *Metropolitan Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of [the] separation of powers is to protect the liberty and security of the governed."), that argument provides no basis for this Court's review. Petitioners do not articulate an independent

2. Although the question is not presented in this case, Section 1605(a)(7) would be constitutional even as applied to a country designated as a "state sponsor of terrorism" after the enactment of AEDPA. Section 1605(a) establishes precise and detailed rules

---

basis for their separation-of-powers claim, but simply contend that Congress violated separation-of-powers principles by impermissibly delegating legislative power to the Executive Branch. See Pet. 14-17. That claim lacks merit for the reasons stated in the text.

Petitioners suggest without significant elaboration (see Pet. 17) that Section 1605(a)(7) violates the equal protection component of the Due Process Clause by treating states designated as state sponsors of terrorism differently from states not so designated, and that use of the term "state sponsor of terrorism" as a non-reviewable prerequisite for liability under Section 1605(a)(7) violates their right to a fair trial under the Fifth Amendment. Those claims are not fairly included within the questions presented in the petition, and in any event they are without merit. Equal protection principles cannot plausibly be thought to preclude Legislative and Executive Branch officials from drawing distinctions between different foreign states, or to require (see Pet. 17) that such distinctions be subjected to heightened judicial scrutiny. See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 211 (1962) ("resolution of [foreign relations] issues frequently turn[s] on standards that defy judicial application, or involve[s] the exercise of a discretion demonstrably committed to the executive or legislature"); note 7, *infra* (explaining that foreign states' access to United States courts has traditionally been committed to the unreviewable discretion of Executive Branch officials). And because Section 1605(a)(7) addresses only the question of foreign states' susceptibility to suit, rather than establishing substantive or procedural rules for adjudicating those suits that are found to be cognizable, it cannot have the effect of "depriving Libya of a fair trial on the merits." Pet. 17; see Pet. App. 46a (district court explains that designation of particular countries as state sponsors of terrorism "in no way affects the merits of the underlying claims or the liability of foreign states against whom actions may be maintained").

concerning the circumstances under which foreign states will be subject to suit in the federal courts. The fact that application of those rules depends in part on Executive Branch determinations creates no constitutional infirmity. To the contrary, Congress's approach is fully consistent with the significant constitutional role and expertise of the Executive Branch in the area of foreign relations. Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-680 (1981) (explaining the "longstanding practice" by which the President has undertaken to settle claims of United States nationals against foreign countries); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936) (observing that "the President alone has the power to speak or listen as a representative of the nation," and that "he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries").

As the court of appeals recognized, this Court in *Jones* v. *United States*, 137 U.S. 202 (1890), "upheld the existence of federal court jurisdiction even though that jurisdiction depended on a factual determination that had been delegated to the Department of State." Pet. App. 33a. The Court in *Jones* rejected a constitutional challenge to provisions of the Guano Islands Act of August 18, 1856, Rev. Stat. §§ 5570-5578 (1878 ed.). The Act provided that "any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, * * * may, at the discretion of the President, be considered as appertaining to the United States." § 5570. It further stated that crimes committed in such areas "shall be deemed committed on the high seas, on board a merchant-ship or vessel belonging to the

United States." § 5576.[5] The Court in *Jones* sustained the defendant's conviction for a murder committed on Navassa Island, an area that had been designated pursuant to the Act as "appertaining to the United States." The Court rejected the defendant's constitutional challenge to the Act's jurisdictional provisions, explaining that "[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges." 137 U.S. at 212; see also *id.* at 224 (concluding that the Act was "constitutional and valid" and affirming the defendant's conviction).[6]

The application of other jurisdictional rules also depends in part on determinations made by the Executive Branch. Diversity jurisdiction under 28 U.S.C. 1332(a)(2) and (4)—the statutory provisions that vest the federal district courts with jurisdiction in cases involving citizens of foreign states, and cases in which foreign states are plaintiffs—is predicated upon Executive Branch recognition of the relevant foreign state. See, *e.g.*, *Matimak Trading Co.* v. *Khalily*, 118 F.3d 76, 79-85 (2d Cir. 1997) (Hong Kong corporation held not to be a citizen of a foreign state for purposes of

---

[5] Federal law currently defines the term "special maritime and territorial jurisdiction of the United States" to include "[a]ny island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States." 18 U.S.C. 7(4).

[6] The Court also held that the President's authority under the Act to identify islands "appertaining to the United States" was "a strictly executive power, affecting foreign relations," that could be exercised by the Department of State on the President's behalf in the absence of a contrary statutory directive. 137 U.S. at 217.

diversity jurisdiction because the United States did not recognize Hong Kong as a sovereign state when the suit was filed), cert. denied, 522 U.S. 1091 (1998). This Court's original jurisdiction in cases involving ambassadors and consuls, see U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(b)(1), extends only to diplomatic representatives who are accredited in the sole and absolute discretion of the Executive Branch. See *In re Baiz*, 135 U.S. 403, 417-418, 428-432 (1890). Diplomatic immunity from suits in United States courts is determined by the State Department's accreditation of a diplomat. See *Abdulaziz* v. *Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984). Head-of-state immunity turns on an Executive Branch determination that a particular individual should be treated as the official head of state. See, *e.g.*, *Lafontant* v. *Aristide*, 844 F. Supp. 128, 131-134 (E.D.N.Y. 1994); see also *Kadic* v. *Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996).[7]

Petitioners' constitutional claim is particularly misconceived given the manner in which issues of foreign sovereign immunity were resolved before the FSIA was enacted in 1976. Until the enactment of the FSIA, "initial responsibility for deciding questions of [foreign] sovereign immunity fell primarily upon the Executive

---

[7] The Court has also held that a foreign state can have access to United States courts only if it has been recognized by the Executive Branch. See *Pfizer Inc.* v *Government of India*, 434 U.S. 308, 319-320 (1978) ("It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue."); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136-138 (1938); see also *United States* v. *Pink*, 315 U.S. 203, 229-230 (1942).

acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983); see also *id.* at 486 ("this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"); *National City Bank* v. *Republic of China*, 348 U.S. 356, 360 (1955) ("[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit"). Although the FSIA reflects Congress's determination that the prior case-by-case approach created unnecessary diplomatic and practical difficulties, see *Verlinden*, 461 U.S. at 488, nothing in this Court's decisions suggests that the pre-FSIA regime was inconsistent with the Constitution.

3. Petitioners also contend (Pet. 18-23) that the court of appeals erred in holding that it lacked pendent appellate jurisdiction over their other constitutional and statutory challenges to the district court's decision. The United States intervened in this case pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Section 1605(a)(7). Although the United States argued in the court of appeals that petitioners' additional constitutional claims failed on the merits, we took no position regarding the scope of that court's appellate jurisdiction. Accordingly, the United States will not address that question at the current stage of the proceedings unless requested to do so by this Court.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

DOUGLAS N. LETTER
FREDDI LIPSTEIN
CARL E. GOLDFARB
Attorneys

DAVID R. ANDREWS
Legal Adviser

JONATHAN B. SCHWARTZ
Deputy Legal Adviser

LINDA JACOBSON
Assistant Legal Adviser

JACK CHOROWSKY
Special Assistant to the Legal Adviser
Department of State

MAY 1999

Supreme Court, U.S.
FILED
MAY 19 1999
CLERK

No. 98-1449

IN THE

Supreme Court of the United States

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*,
Petitioners,

v.

DENICE H. REIN, *et al.*,
Respondents,

and

UNITED STATES OF AMERICA,
Intervenor.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

ROBERT C. MIRONE
Attorney of Record
LAW OFFICES OF
ROBERT C. MIRONE, P.C.
630 Third Avenue, 21st Floor
New York, New York 10017
(212) 949-0550

BRUNO A. RISTAU
LAW OFFICES OF BRUNO A. RISTAU
1701 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20006
(202) 879-2655

DAVID B. MELTZ
1422 W. Peachtree St., N.W.
Suite 320
Atlanta, Georgia 30309
(404) 724-0712
Attorneys for Petitioners

Of Counsel:
JEAN-LUC MARX
72, Boulv. De Courcelles
F-75017 Paris, France

TABLE OF CONTENTS

Page

Petitioners' Reply Brief 1

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES:

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 5, 6, 9, 10

Carey v. Curtis, 3 How. 236 (1845) 6

Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984) 3

Dames & Moore v. Regan, 453 U.S. 654 (1981) 5

Ex parte Republic of Peru, 318 U.S. 578 (1943) 5

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 8

Jones v. United States, 137 U.S. 202 (1890) 7

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 8

Motor Vehicles Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) . . . 4

Swint v. Chambers County Com'n, 514 U.S. 35 (1995) . . 8, 9

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 5, 8

Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d. Cir. 1964); *cert. denied*, 381 U.S. 934 (1965) 5

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Constitution:
Art. I 6

Table of Authorities (continued)

Page

Alien Tort Claims Act, 28 U.S.C. §1350 9

Antiterrorism and Effective Death Penalty Act of 1966 . 2, 3

Export Administration Act of 1979, Sec. 6(j) 1, 2, 3

Foreign Assistance Act of 1961, Sec. 620(a) 1, 3, 4

Foreign Sovereign Immunities Act:

28 U.S.C. §1604 10

28 U.S.C. §1605(a)(7) . . . . . *passim*

28 U.S.C. §1605(a)(7)(A) 1, 3

28 U.S.C. §1605(a)(7)(B)(ii) 10

28 U.S.C. §1605(g) 7

Iran and Libya Sanctions Act of 1996 2

28 U.S.C. § 1332(a)(4) 5

MISCELLANEOUS:

Export Administration Regulation (March 1982), 47 Fed. Reg. 11247 2

H. Conf. R. No. 104-518, 104th Cong., 2d Sess. (1996) . 3

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) . . 8

Pub.L. 104-132 (Apr. 24, 1996), 110 Stat. 1214, 1255 . 2

Pub.L. 104-172 (Aug. 5, 1996), Sec. 3, 110 Stat. 1541 . 2

S. Rep. No. 104-179, 104th Cong., 2d Sess. (1985) . . . 3

This reply brief is submitted in response to the Respondents' Brief in Opposition, filed April 12, 1999 ("Resp. Br."), and the Brief for the United States, filed May 12, 1999 ("U.S. Br.").

I.

The 1996 Amendment to the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(7)("1996 Amendment" or "§1605(a)(7)") that provides the jurisdictional basis for this suit declares in language admitting of no ambiguity that subject-matter jurisdiction will not lie under the Amendment —

> if the foreign state *was not designated as a state sponsor of terrorism* under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) *at the time the act occurred*, unless later so designated as a result of such act; . . .

§1605(a)(7)(A), emphasis added.[1]

We pointed out in the petition (Pet. at 7 n.4) that we were unable to locate a specific designation of Libya as a "state sponsor of terrorism" under either statute referred to in the 1996 Amendment or a publication of such designation in the Federal Register as mandated by both statutes. Respondents grudgingly concede that Libya has not been specifically designated as a "state sponsor of terrorism," as the 1996 Amendment mandates. (Br. Resp. at 5-6). Respondents and the Government, however, contend that Congress itself found Libya to be a "terrorist state" and that, therefore, the statutory prerequisite to the exercise of subject-matter jurisdiction in respect to Libya have been met. (Resp. Br. at 5-6, U.S. Br. at 8-9). The contention does not bear scrutiny.

---

[1] Section 6(j) of the Export Administration Act of 1979 is reproduced in the petition (Pet. at 5).

The Congressional finding in the Antiterrorism and Effective Death Penalty Act of 1966[2] to which respondents point (Resp. Br. at 5), urged the President "to increase the international isolation of state sponsors of international terrorism" and to "oppose any future initiatives to ease sanctions on Libya".

The Congressional "Declaration of Policy" preceding the Iran and Libya Sanctions Act of 1996[3] stated that it is the policy of the United States to seek full compliance by Libya with certain U.N. Security Council resolutions, including ending all support for acts of international terrorism and efforts to develop or acquire weapons of mass destruction.

The Congressional findings and the declaration of policy fail to satisfy the requirement that there be an express, publicly announced determination by the Secretary of State in respect to Libya before subject-matter jurisdiction can be asserted by a federal court.

As final authority respondents point to a proposed revision of the Export Administration Regulations in 1982 by a Deputy Assistant Secretary for Export Administration, 47 Fed. Reg. 11247 (Br. Resp. at 5 n.1) stating that the "President has determined that foreign policy controls affecting exports to Libya should be expanded, and that Libya was being placed in "Country Group S," which would require validated licenses for all exports to Libya of technical data and for most commodities. The announcement contains no determination by the Secretary of State that Libya is a "state sponsor of terrorism" under The Export Administration Act of 1979.

---

[2] Pub.L. 104-132 (Apr. 24, 1996), 110 Stat. 1214, 1255.

[3] Pub.L. 104-172 (Aug. 5, 1996), Sec. 3, 110 Stat. 1541.

It is plain that neither the Congressional findings, its declaration of policy, nor Libya's placement in "Country Group S" by the Department of Commerce for export control purposes meets the statutory mandate that Libya "be designated as a state sponsor of terrorism" under the Export Administration Act of 1979 or the Foreign Assistance Act of 1961. §1605(a)(7)(A) could not be clearer that only a specific designation of Libya under either Act as a "state sponsor of terrorism" would vest statutory subject-matter jurisdiction in a suit against Libya under the 1996 Amendment. The statute commands that absent such designation "the court *shall decline to hear a claim* under [§1605(a)(7)]" (emphasis added). This Court has announced the governing principle thus: "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984).

The Government, further claims that "the Legislative history suggests that Section 1605(a)(7) was intended at least in part to subject Libya and its agencies and instrumentalities to civil liability for the bombing of Pan Am Flight 103." (U.S. Br. at 4 n.2). The "legislative history" that it cites consists of two letters from constituents and remarks of three members of Congress inserted in the Congressional Records. (U.S. Br. at 4 n.2). Libya is not mentioned in any of the committee reports on the Antiterrorism and Effective Death Penalty Act of 1996.[4]

Elsewhere, the Government boldly asserts that "Libya had been designated by the Executive as state sponsor of terrorism well before the bombing of Pan Am Flight 103, and before

---

[4] S. Rep. No. 104-179, 104th Cong., 2d Sess. (1995); H. Conf. R. No. 104, 518, 104th Cong., 2d Sess. (1996).

the enactment of Section 1605(a)(7)". (U.S. Br. at 8). The Government's brief, however, does not identify the requisite designation by the Secretary of State under the Export Administration Act and the Foreign Assistance Act. Both Acts also require that "each determination of the Secretary of State . . . in effect on December 12, 1989, *shall be published* in the Federal Register." Had such a publication been made, the Government would most assuredly have brought it to the attention of the Court. The Government's "*post hoc* rationalizations are no substitute for adequate action by the agency itself." *Motor Vehicle Mfrs. Ass'n of Unites States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Consequently, the district court lacked statutory subject-matter jurisdiction because of the Executive's noncompliance with the jurisdictional precondition expressed in §1605(a)(7).

II.

A. Respondents and the Government contend next that in determining whether a foreign state enjoys immunity from suit the Executive exercises its own powers, not powers delegated to it by Congress. (Resp. Br. at 7, U.S. Br. at 11). They support their conclusion with the familiar principle that in the conduct of the nation's foreign relations the Executive possesses plenary powers (*id.* at 8-9) and they then point to the State Department's pre-FSIA suggestions of immunity practice which, they claim, *divested* the courts of subject-matter jurisdiction. Based on this premise respondents claim that the 1996 Amendment merely "restores to the Executive a small fraction of its [pre-FSIA] power" to make determinations regarding sovereign immunity (*id.* at 10). The Government claims that petitioners' constitutional claim is misconceived given the manner in which issues of foreign sovereign immunity were resolved before the FSIA was enacted in 1976. (U.S. Br. at 13-14).

Respondents and the Government are demonstrably wrong. A pre-FSIA suggestion of immunity had the effect of requiring the courts to *relinquish* jurisdiction previously obtained under an established jurisdictional statute (commonly admiralty or diversity jurisdiction). *See Ex Parte Republic of Peru*, 318 U.S. 578, 587 (1943) (jurisdiction based on *in rem* seizure of vessel); *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964) (jurisdiction based on diversity of citizenship), *cert. denied*, 381 U.S. 934 (1965). It was never the province of a suggestion of immunity to vest or establish subject-matter jurisdiction in a court.

With the passage of the FSIA in 1976, Congress abolished *in rem* action and diversity jurisdiction against foreign states. 28 U.S.C. 1332(a)(4). See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5 (1989)(explaining changes in diversity jurisdiction). In lieu of the earlier jurisdictional bases, the FSIA established a *comprehensive jurisdictional regime* governing all aspects of suits against foreign states. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). Nothing in the Court's review of the historical antecedents of the FSIA suggests that prior to the FSIA an Executive suggestion of immunity established or divested *subject-matter jurisdiction* of federal courts. See *Dames & Moore v. Regan*, 453 U.S. 654, 684 (1981)("No one would suggest that a determination of sovereign immunity divests the federal courts of 'jurisdiction'.")

Hence to the extent that the 1996 Amendment purports to empower the Executive to establish the subject-matter jurisdiction of federal courts with respect to designated foreign, the Act is unconstitutional.

B. Respondents and the Government contend that Congress' decision to make the jurisdiction of the federal courts a function of sovereign immunity cannot deprive the

Executive of its Constitutional power to make foreign policy decisions, including decisions that have sovereign immunity implications (Resp. Br. at 14). Respondents conclude that "in making sovereign immunity determinations, the Executive exercises its own powers, not those of Congress." (See also U.S. Br. at 10-11).

None of the principles and cases on which the respondents and Government rely support the thesis that the Executive may establish subject-matter jurisdiction in federal courts in suits against foreign sovereigns. Until the passage of the 1996 Amendment, Congress never passed an act ostensibly governing access by private parties to federal courts in suits against foreign states, and leaving it to the Executive Department to designate which particular state can be subjected to suit. This Court has emphasized that it is a "settled proposition that the subject-matter jurisdiction of the lower federal courts is determined *by Congress* 'in the exact degrees and character which *to Congress* may seem proper for the public good'." *Argentine Republic*, 488 U.S., at 433 (citing *Cary v. Curtis*, 3 How. 236, 245 (1845), emphasis added). Establishment of subject-matter jurisdiction of federal courts cannot be delegated by Congress, as here, to further foreign policy objectives of the Executive.

Petitioners do not dispute the Executive's constitutional authority and his preeminent role in international affairs; his "power to speak on listen as a representative of the nation", his authority to recognize or derecognize foreign states, his authority to receive ambassadors, or his sole competence to determine whom the United States recognizes as the official head of a foreign nation (U.S. Br. at 12-13). None of these constitutional functions and duties, however, confer any Art. I competence to determine the jurisdiction of lower federal courts.

Jones v. Unites States, 137 U.S. 202 (1890), which the court of appeals found dispositive and the Government places heavy reliance here (U.S. Br. at 11-12) does not hold that the Executive may establish the jurisdiction of federal courts. In *Jones*, Congress passed a statute authorizing the President to determine whether certain guano islands in the Caribbean "appertained to the United States." In addition, Congress provided that offenses committed on a designated guano island would be prosecuted as if committed aboard an American vessel on the high seas. Jones who had been convicted for murder on one of the islands, challenged the President's designation of the Island as "appertaining to the United States". The Court dismissed the challenge holding that the Executive's determination who is *de jure* or *de facto* rule of a territory is conclusive on the courts. 137 U.S. at 224.

Unlike here, the President's designation of the guano island as United States territory did not vest subject-matter jurisdiction of the district court. The court's jurisdiction was based on Congress' extension of an existing criminal statute. Here the competence of the district court depends on an *ad hoc* political designation by the Executive of a target state; as shown without such designation, the court may not hear the suit under §1605(a)(7)— it plainly lacks subject-matter jurisdiction.[5]

---

[5] The Government also contends (U.S. Br. at 10 n.4) that "because Section 1605(a)(7) addresses only the question of foreign states susceptibility to suit, rather than establishing substantive or procedural rules of adjudicating those suits that are found to be cognizable, it cannot have the effect of 'depriving Libya of a fair trial on the merits'."

Our petition did not raise the fairness of the procedures to be used in adjudicating suits under the 1996 Amendment, since that issue is not jurisdictional. However, because the Government chose to go into the issue of fairness, we respectfully call the Court's attention to the extensive and oppressive procedural changes that the 1996 Amendment would impose on the courts in a trial on the merits; see § 1605(g) (severe

III.

Our petition urges that the court of appeals erred in refusing to address the issue of the district court's personal jurisdiction over Libya on this collateral appeal. (Pet. 18-21). Respondents insist that the court of appeals correctly followed the guidelines in *Swint v. Chambers County Com'n*, 514 U.S. 35 (1995)(Resp. Br. At 18).

Swint, however, is readily distinguishable. The Court there disapproved of the use of pendent appellate jurisdiction over a nonappealable issue involving parties different from those involved in the appealable issue. The Court explicitly refrained from "definitively or preemptively" rejecting the use of pendent appellate jurisdiction over related claims. It held that such jurisdiction may be appropriate when a nonappealable decision is "inextricably intertwined" with an appealable decision or when "review of the former decision [is] necessary to ensure meaningful review of the latter." 514 U.S., at 51-52.

As *Verlinden* teaches, 461 U.S., at 485 n.5, the unique design of the FSIA is such that service of process, personal jurisdiction and subject-matter jurisdiction are fully interrelated: if service of process does not comply with the methods of service provided in the Act, the district court will not only lack personal jurisdiction but also competence to adjudicate the case. If valid service is made, but the exercise of personal jurisdiction would offend due process[6], the court

---

limitations on discovery, stay of discovery up to ten years, evaluation of evidence, and bar on motions to dismiss or for summary judgment).

[6] See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 13 (1976). "Section 1330(b) provides in effect, a federal long-arm statute over foreign states, . . . The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision." Citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

will also lack subject matter jurisdiction to hear the case. In consequence in suits against foreign states under the FSIA subject-matter jurisdiction, personal jurisdiction and service of process are closely linked and satisfy both the "inextricably intertwined" and "necessary to insure meaningful review" test of *Swint*.

Both subject-matter and personal jurisdiction present pure questions of law. If, contrary to the FSIA's design, the issue of personal jurisdiction is viewed as being wholly divorced from the court's competence, the purpose of sovereign immunity from suit — not to subject a foreign state to a protracted trial on the merits without an initial review of jurisdiction — will render the immunity doctrine illusory. The court of appeal's view that personal jurisdiction "can be reviewed effectively on appeal from final judgment" (App. Pet. at 16a) misconceives the purpose of a collateral appeals in suits against foreign sovereign states.

IV.

Respondents urge that the Court not review the trial court's ruling that it has subject matter jurisdiction to hear the alien plaintiffs' claims *against Libya* under the Alien Tort Claims Act (28 U.S.C. §1350) under the court's supplemental jurisdiction. They say that because petitioners are subject to suit by U.S. nationals under §1605(a)(7), "they will bear no greater burden by defending claims by foreign nationals that arise out of the very same facts" (Resp. Br. at 21). They postulate that "whether Petitioners are found to be immune from suit under the Alien Tort Claims Act now, or later, is of no moment." (*Ibid*). These contentions are specious. There are scores of alien plaintiffs in this case who do not qualify to

---

The report concluded that "Section 1330(b), 1608 [service] a3nd 1605-1607 [exception to immunity] are all *carefully interconnected*." (Emphasis added).

bring suit under §1605(a)(7) and any potential trial on the merits would be vastly complicated by their presence.

More importantly, the district court's jurisdictional ruling wholly disregards the 1996 Amendment's express exclusion of aliens from bringing suit; see §1605(a)(7)(B)(ii). The court's ruling squarely conflicts with the *Amarada Hess* Court's decision that the Alien Claims Tort Act cannot serve as a jurisdictional predicate for suits against foreign states. 488 U.S., at 438.

Dispositively here, §1604 of the FSIA expressly provides that "a foreign state *shall be immune* from the jurisdiction of the courts of the United States and of the States *except as provided in sections 1605 and 1607 of this chapter*." (28 U.S.C. §1604; emphasis added). It is thus plain that a federal court cannot assert jurisdiction, supplemental or otherwise, over a claim against a foreign state in the absence of jurisdiction under the FSIA. *Amerada Hess*, 488 U.S., at 439 ("the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court.").

The district court's ruling that it is competent to hear the aliens' claims against Libya under supplemental jurisdiction is demonstrably erroneous and should be reviewed by this Court.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the Court should grant the writ of certiorari.

Respectfully submitted,

ROBERT C. MIRONE
Attorney of Record
LAW OFFICES OF
ROBERT C. MIRONE, P.C.
630 Third Avenue, 21st Floor
New York, New York 10017
(212) 949-0550

BRUNO A. RISTAU
LAW OFFICES OF
BRUNO A. RISTAU
1701 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20006
(202) 879-2655

DAVID B. MELTZ
1422 W. Peachtree St., N.W.
Suite 320
Atlanta, Georgia 30309
(404) 724-0712
Attorneys for Petitioners

Of Counsel:
JEAN-LUC MARX
72, Boulv. De Courcelles
F-75017 Paris, France